No. 89-7743-CFX
Status: GRANTED

Title: Thaddeus Donald Edmonson, Petitioner
v.
Leesville Concrete Company, Inc.

Docketed:
May 30, 1990

Court: United States Court of Appeals
for the Fifth Circuit

See also:
90-1
90-240

Counsel for petitioner: Doyle,James

Counsel for respondent: Honeycutt,John

Entry	Date	Note	Proceedings and Orders
1	May 30 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jul 11 1990		Brief of respondent Leesville Concrete Company, Inc. in opposition filed.
4	Jul 19 1990		DISTRIBUTED. September 24, 1990
6	Oct 1 1990		Petition GRANTED.
			**********
7	Oct 23 1990		Record filed.
		*	USDC-1 vol.
8	Nov 13 1990		Joint appendix filed.
9	Nov 13 1990		Record filed.
		*	record received-one vol. USCA 5.
10	Nov 13 1990		Brief of petitioner Thaddeus Edmonson filed.
11	Nov 15 1990		Brief amici curiae of NAACP Legal Defense and Education Fund, Inc., et al. filed.
12	Nov 15 1990		Brief amicus curiae of ACLU filed.
13	Nov 23 1990		SET FOR ARGUMENT TUESDAY, JANUARY 15, 1991. (3RD CASE)
14	Nov 29 1990		CIRCULATED.
15	Dec 5 1990		Request for an extension of time until February 17, 1991, to file respondent's brief on the merits denied. Request to reschedule argument denied.
17	Dec 15 1990	X	Brief amicus curiae of Louisiana Association of Defense Counsel filed.
16	Dec 17 1990	X	Brief amicus curiae of Defense Research Institute filed.
18	Dec 17 1990	X	Brief amicus curiae of Dixie Insurance Company filed.
19	Dec 17 1990	X	Brief of respondent Leesville Concrete filed.
20	Jan 4 1991	X	Reply brief of petitioner Thaddeus Edmonson filed.
21	Jan 15 1991		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 89-7743 (2)

In The
SUPREME COURT OF THE UNITED STATES
October Term 1989

THADDEUS DONALD EDMONSON

Petitioner

versus

LEESVILLE CONCRETE COMPANY, INC.

Respondent

On Petition for Writ of Certiorari
To The
U.S. Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI OF THADDEUS DONALD EDMONSON

James B. Doyle
Voorhies & Labbe'
P. O. Box 3527
Lafayette, LA 70502
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Attorney for Petitioner,
Thaddeus Donald Edmonson

QUESTIONS PRESENTED FOR REVIEW

I.

Should the rule of *Batson v. Kentucky*, *infra*, be adopted in civil cases in the United States District Courts to prohibit a party from excusing from the jury venire, by means of peremptory challenge, a member of the same minority race as his opposite litigant, when a *prima facie* showing pursuant to the *Batson* burdens of proof has been made?

II.

Is a United States District Judge empowered to supervise the exercise of peremptory challenges by a party pursuant to 28 U.S.C. 1870, if it be shown by *prima facie* that such exercise is taking place in a constitutionally impermissible manner?

III.

When a private lawyer appearing in the course of litigation on behalf of a private party against a member of a minority discriminatorily utilizes a power granted to him by the sovereign, does that private counsel engage in "state action" sufficient to bring him within the constitutional limitations imposed by the Equal Protection Clause of the Fourteenth Amendment?

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LIST OF PARTIES

The following are the parties to this proceeding:

Thaddeus Donald Edmonson
Plaintiff-Petitioner

Leesville Concrete Company, Inc.
Defendant-Respondent

James B. Doyle of the law firm of
Voorhies & Labbé
P. O. Box 3527
Lafayette, LA 70502
Counsel for Plaintiff-Petitioner

John B. Honeycutt, Jr. and
Steven C. Graalmann of the law firm of
Percy, Smith, Wilson, Foote, Walker & Honeycutt
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DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 895 F.2d 218 (5th Cir. 1990).

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 690 F.2d 308 (5th Cir. 1988).

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JURISDICTION

This Petition seeks review of the judgment of the United States Court of Appeals, Fifth Circuit, entered on the 5th day of December, 1988. After its entry, Leesville Concrete petitioned for a rehearing and/or rehearing *en banc*. On the 1st day of March, 1990, the Court of Appeals issued its decision *en banc* and on the 23rd day of March, 1990, issued its mandate.

This Petition is filed timely pursuant to 28 U.S.C. 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

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STATUTES PRESENTED FOR REVIEW

I.

United States Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II.

United States Constitution, Amendment 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

III.

United States Constitution, Amendment 14

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IV.

28 U.S.C. 1861. Declaration of Policy

It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the Court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

V.

28 U.S.C. 1862. Discrimination Prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States and the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

VI.

28 U.S.C. 1870. Challenges

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

Thaddeus Donald EDMONSON,
Plaintiff-Appellant,

v.

LEESVILLE CONCRETE COMPANY, INC.,
Defendant-Appellee.

No. 87-4804.

United States Court of Appeals,
Fifth Circuit.

March 1, 1990.

Injured black worker brought personal injury action. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., entered judgment on jury verdict which found worker 80% contributorily negligent, and worker appealed, claiming that defendant had used all three peremptory strikes to exclude blacks from jury, leaving only one on final panel of 12. The Court of Appeals, 860 F.2d 1308, remanded. Worker petitioned for rehearing en banc, which was granted. On rehearing the Court of Appeals, Gee, Circuit Judge, held that civil litigants were not required, on equal protection grounds, to give reasons for peremptory challenges to prospective jurors, even where challenges were claimed to have been made on racial grounds.

District Court judgment affirmed.

Politz, Circuit Judge, concurred specially and filed statement.

King, Circuit Judge, concurred in the result.

Alvin B. Rubin, Senior Circuit Judge, dissented and filed opinion in which Wisdom, Senior Circuit Judge, Johnson and Jerre S. Williams, Circuit Judges, joined.

Constitutional Law ⇐221(4)
Jury ⇐33(5.1)

Equal protection does not require that civil litigant challenging prospective juror peremptorily be made to give reason for such action, even though challenge is claimed to have been made on racial grounds. U.S.C.A. Const.Amends. 5, 14.

Appeal from the United States District Court for the Western District of Louisiana.

Before CLARK, Chief Judge, WISDOM, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHÉ, Circuit Judges.[1]

GEE, Circuit Judge:

Today we decide whether a private litigant in a federal civil case who challenges a venire member peremptorily can be made to give reasons for his action. Specifically, we must determine whether he can be required to do so when his opposing party is a black person and the venireman stricken is black, so as to rebut the inference that he exercised the strike because of the would-be juror's ethnic group.

1. Senior Judges Wisdom and Rubin were members of the original panel and sit on the en banc court for that reason, Judge Rubin having assumed senior status since the panel opinion was handed down.

The Supreme Court has imposed such a requirement in criminal prosecutions of black defendants, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); and in partial reliance on that decision a panel of our court has extended the principle to this civil damage suit by reversing the trial court, which had held that such a rule does not obtain in civil litigation. *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir.1988). We now reconsider that decision en banc and affirm the trial court.

We do so for two reasons: the mechanical one, that state action is not present in such a case as this; and the logical one, that striking a venireman in a civil case because you fear he may tend to favor your opponent over you neither demeans him nor calls in question the fairness of the civil justice system.

Facts

The panel opinion states the relevant facts succinctly:

> Injured in an accident on a construction job at Fort Polk, Louisiana, a federal enclave, Thaddeus Donald Edmonson, a 34-year-old black male, sued Leesville Concrete Company for negligence in federal district court. The case was tried to a jury.
>
> Edmonson used all three of his peremptory challenges to excuse members of the venire who were white. Leesville challenged peremptorily two prospective jurors who were black and one who was white. Citing *Batson*, Edmonson asked the district court to require Leesville to articulate a neutral explanation for the manner in which it had exercised its challenges. The district court denied the request on the ground that the *Batson* ruling did not apply to civil proceedings, and then proceeded to impanel a jury composed of eleven white jurors and one black juror. The jury rendered a verdict for Edmonson, assessing his total damages at $90,000, but because it found him 80% contributorily negligent, awarded him only $18,000. Edmonson seeks a new trial because of Leesville's alleged racial discrimination in its exercise of peremptory challenges.

Id. at 1309–10 (footnote deleted).

The Peremptory Challenge: 1066 A.D. through Swain

The history of the peremptory challenge in felony cases stretches back many hundreds of years to the roots of the common law. That history, both in England and in our Country, is reviewed with painstaking thoroughness by Justice White in his opinion for the Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). To his account we neither can nor need add anything; we merely repeat his relevant conclusions here for the reader's convenience:

(1) "The use of peremptory challenges is of ancient origin and is given in aid of the party's interest in having a fair and impartial jury." Wright & Miller, Federal Practice & Procedures: Civil § 2483, at 473 (citing to *Swain*, 380 U.S. 202, 217, 85 S.Ct. 824, 834, 13 L.Ed.2d 759 (1965)).

(2) "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.... It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another....' It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." 380 U.S., at 220, 85 S.Ct. at 835.

(3) "The presumption [that the prosecutor is using the State's challenges to obtain a fair and impartial jury] is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand, all Negroes were removed from the jury *or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.*" 380 U.S., at 222, 85 S.Ct. at 836 (emphasis added).

(4) Where, however, it is shown that peremptories are being used to serve the purpose of generally disqualifying blacks as jurors on a racial basis, relief can be had.

A vigorous dissent, written by Justice Goldberg and joined by Chief Justice Warren and Justice Douglas, would have extended the holding of *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), to cover the situation presented by *Swain*, taking the view that a sufficient showing had been made that the strikes in question were exercised, not with reference to the outcome in the particular case, but for the purpose of denying to black citizens the same right to participate in the administration of justice as whites enjoyed.[2] 380 U.S., at 229, 85 S.Ct. at 840 *et seq.*; see also *United States v. Leslie*, 783 F.2d 541, 545-46 (5th Cir.1986) (en banc), vacated and remanded, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987).

And so matters rested for twenty years. During these, the Equal Protection Clause was thought to bar any general or systematic disqualification of black citizens as veniremen on any notion of supposed incapacity or inferiority, but—as *Swain* explicitly noted—to permit them to be cut from a jury panel by peremptory challenge for any reason or for no reason, just as any other person might be struck. In essence, the peremptory could be exercised on any ground whatever, including race, that was directed and limited to seeking a given result in a particular case. Only when the challenge could be shown to have been employed as a device to eliminate blacks from jury service generally was it vulnerable to constitutional attack under *Swain*.

Batson

A little over three years ago, in *Batson v. Kentucky*, *supra*, the Court acted for the first time seriously to trammel the use of the peremptory challenge to strike black veniremen in the criminal prosecution of a black.[3] James Batson, a black male, was indicted for burglary and receiving stolen goods. Because the prosecutor struck all four black persons on the venire, Batson was tried by an all-white jury and convicted. His Sixth and Fourteenth Amendment objections unavailing, he sought and got relief from the Supreme Court. The form which it took, however, was a reaffirmation

2. *Strauder* invalidated a state law limiting eligibility for jury service to white males.

3. The Court's citation to *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) implies, however, and the general wording and tone of *Batson* further indicate, that the ruling is not limited to black citizens.

of the root principle of *Swain*—that systematic exclusion of black jurors from trying black defendants in criminal cases infringes the rights of both—but a revision to lighten the evidentiary burden announced in *Swain*.

Justice Powell's opinion in *Batson* therefore observes that "[a] number of lower courts following the teaching of Swain reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause." [4] 476 U.S., at 92, 106 S.Ct., at 172. (footnote deleted). Disapproving this very high standard of proof, which by hindsight it correctly characterized as "a crippling burden" [5], the Court laid out a less demanding, two-step process of proof: first, a prima facie showing by the defendant of discrimination against veniremen of his race; second, a coming forward by the state with a neutral explanation for each of its peremptory challenges to veniremen of that race. The Court is at pains, moreover, to make plain that an assumption of partiality on the mere basis of shared race will not do as such an explanation.[6] 476 U.S., at 97, 106 S.Ct., at 1723. Thus the law of strikes in criminal cases. Should it be extended to civil ones?

State Action?

This issue is accurately stated by our panel as: "[W]hether the exercise of peremptory challenges by a private litigant in a civil action pending in federal court is a government action, to which the Fifth Amendment applies, or a private action, which the Constitution does not reach." 860 F.2d, at 1310. The answer to it is dispositive of the appeal; for if governmental action is not present, then the courts hold no warrant to interfere, in the name of equal protection, with the system of civil peremptory challenges.[7]

4. With deference, this is scarcely surprising in view of the presence in *Swain* of such statements as "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 380 U.S., at 221, 85 S.Ct., at 830.

5. For essentially the reasons set out by our Court in *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir.1971).

6. There are at least two reasons why a prosecutor might strike a black venireman called in the prosecution of a black defendant: the notion that black citizens are inherently unfit to serve as jurors, as per the statute invalidated in *Strauder*, or a belief that a black person may tend to favor members of his own ethnic group. The former is demeaning; the latter is not—although a belief in such a proposition is almost surely irrational, in view of the common knowledge that in our nation blacks both commit and suffer disproportionately from criminal violence. Thus, it seems plain, the law-abiding black citizen is scarcely likely to be indulgent toward *any* criminal, black or white—rather the contrary. See Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545, 553-54 (1974-75).

At all events, the *Batson* Court appears to have concluded that since the latter, undemeaning reason for challenge cannot in practice be separated from the former, neither can be countenanced. Clearly, the reasoning supporting the Court's new posture on proof of race discrimination in jury strikes would apply equally to strikes based on religious affiliation, nationality, and the like. Equally clearly, such an extension would likely complicate the process of exercising peremptory challenges to such an extent that issues arising from it would at last wag those of guilt or innocence, thus effectively spelling the end of strikes in criminal cases. Indeed, Justice Marshall, in a separate concurrence, contends for just such a result. 476 U.S., at 107-8, 106 S.Ct., at 1728-9.

7. Indeed, as Part II of the panel opinion correctly notes, the Constitution says nothing of equal protection as regards acts of the federal government. The Supreme Court has, however, repaired this omission by im-

Our inquiry is assisted by the two-step test laid down by the Supreme Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982), for assaying the presence or absence of state action. The first requirement is clearly present here: that the claimed deprivation has resulted from the exercise of a right or privilege having its source in governmental authority. The second, however, seems equally clearly to be wanting: the presence of some figure who can fairly be characterized as a state actor.

In *Batson*, no such doubt arose: there the entire proceeding was commenced and carried through by the prosecuting attorney, the very embodiment of the state's power, acting in the direct interest of its most fundamental function, maintaining law and order. In today's case, no such figure is present; and only two conceivable candidates present themselves: the trial judge and the private defendant's trial attorney.

The notion of trial judge as "state actor" need not detain us long. In the first place, as the Supreme Court observed in *Swain*—factually and not in such a manner as to be subject to overruling by *Batson*—the peremptory challenge "is one exercised ... without being subject to the court's control...." 380 U.S., at 220, 85 S.Ct., at 835. The merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined.[8] No exercise of judicial discretion is involved, rather a mere standing aside; so that the fault—if it is a fault—lies with the system which permits such challenges, not with the judge's mere ministerial compliance with what the rule requires.[9] Finally, it is hard to see how the Supreme Court could have reserved judgment, as it purported to do in *Batson*, on the strikes by defense counsel, if the "actor" was the judge. 476 U.S., at 89 n. 12, 106 S.Ct., at 1719 n. 12. If the judge is the actor, then, and if his mere excusing of veniremen who have been peremptorily challenged from further attendance at court be deemed an "act," it follows that every aspect of every civil trial, state and federal, is constitutionalized—a quantum procedural leap that we leave for the Su-

plication. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

8. To hold that this constitutes "action" would require our disregarding expressions of the Court such as that found in *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982), that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement ... that the choice must ... be deemed to be that of the State" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible ... under the ... Fourteenth Amendment." (citations omitted). See also *Evans v. Abney*, 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970) (giving indirect effect to private person's discriminatory intent not state action for equal protection purposes.)

9. An example of such a system, which, as it involves the state itself requires the presence of no "state actor," is to be found in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), invalidating state replevin laws as violating due process for want of a hearing before chattels could be repossessed. Such a legal system, if used at all in the manner specified by the state, would necessarily involve unconstitutional actions. The system of peremptory challenges, by contrast, specifies no unconstitutional actions but is at most—and like most systems—subject to improper use by one disposed to do so. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1722.

preme Court to make, should it wish to do so.

As for private counsel, it is inconceivable to us that a privately-retained lawyer, serving a private client in a damage suit such as this, should be viewed as a state actor.[10] Clearly he cannot be, at any rate, so long as the 1981 Supreme Court holding stands that even a public defender, paid by the state, in a criminal proceeding against an indigent defendant is not. *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). Nor, common sense tells us, does private counsel partake of such a character. True, he is licensed by the State; not, however, for its benefit but in the hope of insuring a minimum degree of competence to his clients. Like the public defender, it is *their* interests, their partisan interests, which he serves; and where their proper and lawful interests and those of the State come into conflict, he hews to those of his client in every instance—and properly so. Nor is the interest of the state by any measure so deeply involved in civil litigation between private parties in its own courts as in criminal litigation there: in the former case it simply furnishes a level playing field for dispute resolution in the name of civic peace, in the latter it is the instigator and actor, with powerful interests of its own at stake. Nor can it be said that private counsel in a civil damage suit performs a "public function."[11]

And so, since it appears to us that no state actor is present on the scene of today's case, we conclude that Constitutional considerations are not implicated. So much for the mechanical application of precedent; we turn in closing to a few underlying considerations of logic and policy.

Strikes in Practice

A function of strikes is to allow the parties to participate to some degree in the selection of the jury that is to try their case, to the end that each may not only have, but perceive that he has had, a fair and impartial trial. It is certainly maintainable that this function is of greater significance in federal court proceedings than in most, for there the attorney's role in jury selection is perhaps at its nadir among American jurisdictions. Ordinarily, for example, counsel does not there address the venire; and his other functions are correspondingly reduced in this aspect of trial.

It is proverbial that strikes are exercised on diverse bases: to remove the venireman whom counsel thinks the court should have excused for cause or, occasionally, in the case where counsel is allowed to interrogate the venire, the venireman whom he perceives that he has seriously offended by his questions. But even more tenuously, strikes are exercised to excuse anyone who simply did not sit right with counsel ("I didn't like the way she looked at my client"), or whom he feels might for *any* reason have a predisposition toward the other side, or an aversion to his own. The literature on this subject, it being one familiar only to trial lawyers—a group not noted for its special devotion to scholarly writing—is sparse, but see Sutin, The Exercise of Challenges, 44 F.R.D. 286 (1967); Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545 (1975). At any rate, every lawyer with substantial trial experience knows that he has often exercised strikes for which he could articulate no clear reason even to himself, but which he desperately wished to exercise. And at all events, a procedural device of such great age and broad acceptance as the civil peremptory challenge should require little defense: clearly, for a long time, and in jurisdiction after jurisdiction, it has been found to serve useful purposes. We should therefore avoid tampering with its essential feature, the absence of a requirement to give reasons for its use, unless either the reasoning or the authority of *Batson* requires that we do so. Because, despite their superficial similarity, the true contexts of the criminal prosecution and the civil trial are greatly different, we conclude that neither does.

To begin with, and as we note briefly above, the government is directly involved in the criminal prosecution, appearing in the person of one of its central figures, the prosecutor—without whose will it cannot be brought and upon whose performance as its central actor all depends. His role has no counterpart in civil litigation, for in this respect his will *is* the will of the State. But, more fundamentally, the entire purpose of a criminal prosecution is to enforce the purposes of the state, whereas the state has no purpose at all in civil litigation beyond preempting the use of private force to settle disputes—a purpose that is as well served, if the parties consent, by an arbitration to which the state is no party. Finally, in a criminal prosecution the jury serves in some real sense as, not only a safeguard against, but an instrument of, the state's power. Once invoked, its collective will is sovereign as to guilt or innocence and, sometimes, even as to life or death. For these reasons, we do not believe that a court proceeding so cautiously as did the Batson court, one which was careful to point out that its holding did not extend even to the exercising of peremptories by defense counsel in a criminal case, would have intended by that decision's authority to dictate our result today. 476 U.S., at 89 n. 12, 106 S.Ct., at 1719 n. 12.

Nor do we think that the Court's reasoning does so. As we have observed above, Justice Powell's opinion in *Batson* expressly states that its scope is limited to a reexamination of "that portion of Swain ... concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race" from the jury. 476 U.S., at 82, 106 S.Ct., at 1714 (citation omitted).[12] In all other respects, *Batson* simply reaffirms *Swain*'s holding that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 476 U.S., at 84, 106 S.Ct., at 1716, quoting *Swain*, 380 U.S., at 203–4, 85 S.Ct., at 826–7. This is, however, a far cry

10. We have no occasion to consider the situation presented where the state appears as a civil litigant.

11. See *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). In *Terry*, the Supreme Court held the Jaybird party, a private political organization which excluded blacks from its nomination balloting, to be a state actor. Although the jury selection process, like the election process, involves both private and state action, the traditional roles of private counsel and the state have remained discrete in this case. The present situation is thus distinguishable from that in *Terry*, in which the nomination process of the Jaybird party was found to be "an integral part, indeed the only effective part, of the [entire] elective process." *Id.* at 469, 73 S.Ct. at 813.

12. The Court expressed no view on Batson's Sixth Amendment arguments. 476 U.S., at 84 n. 4, 106 S.Ct., at 1716 n. 4.

from the proposition advanced by Mr. Edmonson in today's case, which can fairly be stated as

> Whenever a private litigant sued for damages by a black plaintiff strikes a black venireman, he can be required to give a reason other than their common ethnicity for having done so.

For several reasons, we do not believe that the considerations underlying *Swain* or the reasoning upon which it rests support such a proposition as this.

To begin with, the informing principle of the *Strauder-Swain-Batson* line of decisions is that black citizens cannot, as a matter of Constitutional law, be barred from full participation in the administration of criminal justice as jurors. *Strauder*, of course, involved an example of the most overt of such attempts to do so: an exclusion of blacks by statute from the entire venire summons process. As Judge Garwood, writing for our en banc court, has noted, such an exclusion is racially demeaning. *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir.1986) (en banc), vacated and remanded, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987). *Swain* and *Ba...on* were concerned with use by the state of peremptory challenges to accomplish the same purpose in a more roundabout way: to remove black veniremen from the case simply because they were black, the decisions differing from each other solely on the manner of proof, but agreeing in principle. And that principle, to reiterate it, is that neither directly nor indirectly can black citizens be denied the opportunity for criminal jury service on racial grounds alone. The reason underlying the principle is that the Constitution does not permit unequal treatment of citizens on the ground of race and will not entertain—because it is insulting—even the suggestion that one is unfit to discharge a civic duty for such a reason.

This is a far cry, however, from striking a black venireman for particular reasons in a particular case, even for reasons having to do with his race. To take a few examples, for obvious reasons counsel representing a defendant airline in a damage suit might well peremptorily challenge a black airline pilot who was himself on strike for higher wages against another airline. Such a challenge, based on an assumed situational animosity toward his client, clearly raises no equal protection problems, even though the venireman stricken is black. To take a closer case, however, one may well imagine that counsel defending a well-known member of the Ku Klux Klan in an action for, say, breach of contract by a white plaintiff might strike any black veniremen whom he had been unable to convince the judge to excuse for cause, not because of any notion of ethnic inferiority, but rather on the prudential ground of probable hostility, ineradicable despite the subject's best efforts. Such an action does not demean the stricken subject; it merely recognizes a probable fact of life. And finally, (arguably) today's case: counsel, representing a party opposing a black defendant, who strikes all blacks on the venire because he fears that they *may* be inclined—even if only ever so slightly—to favor one of their own. It seems to us very plain indeed that none of these strikes has been taken on a ground which is demeaning to its object.

As for the third example given, however, in *Batson* the Supreme Court clearly stated that such a reason must not be accepted for a strike in a criminal case:

> But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. *Norris v. Alabama*, 294 US, [587] at 598–599, 79 LEd 1074, 55 SCt 579 [583–584]; see *Thompson v. United States*, 469 US 1024, 1026, 83 LEd2d 369, 105 SCt 443 [445] (1984) (Brennan, Jr., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, supra, [476 U.S.] at 86 [106 S.Ct. at 1717], 90 LEd2d, at 80, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's race.

476 U.S., at 97–98, 106 S.Ct., at 1723–1724.

Thus, by Supreme Court mandate, in the criminal prosecution of a black defendant, it is as much a violation of equal protection for the prosecutor to strike a black venireman because he thinks he might be more inclined than another to favor such a defendant as it is to strike him because he views him as inherently unfit for service as a juror because of his race. More to the purpose, we think, than attempting to equate the two actions described is a recognition that to countenance such an explanation for such a strike would be to return to pre-*Strauder* days and permit the prosecutor in such a case, having thought up a new set of arguments for doing so, to strike a black venireman merely because he is black. The Court's result is, therefore, explicable on practical grounds in the context of criminal prosecutions. We think it would be much less so, however, in civil actions for damages between private parties—such as this one.

In a civil suit, unlike a criminal prosecution, the state itself takes no action on its own behalf that could be viewed as exhibiting official prejudice. It is, we think, a sound policy that requires the state to conform to stricter standards and appearances in dealing with its citizens than are demanded of those citizens in their dealings with each other. As an illustration, we need look no further than Justice Sutherland's often-quoted language in *Berger v. United States*:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, at 88, 55 S.Ct. 629, at 633, 79 L.Ed. 1314 (1935).

But more fundamentally, vastly different things are at stake in criminal trials and as

regards the criminal jury than where civil trials and civil juries are concerned. The criminal jury is a central feature of the criminal justice system, where liberty and even life are at stake. It holds not only fact-finding powers but, because of the Double Jeopardy Clause, the de facto power to pardon. As to the criminal jury, then, we can see how the Court might strike the balance which it did in *Batson* between the actuality or even the appearance of racially motivated strikes and the "any reason or no reason" rule for peremptory challenges that has come down to us from the common law.

The civil jury, on the other hand, serves a fact-finding function only, and the issues before it are, generally speaking, limited to economic ones. To be sure, it is part of the civil justice system just as its criminal counterpart is part of the criminal one; but its function is far less pivotal and central even to civil litigation than that of a jury in a criminal case is to criminal justice. Private counsel, in striking such a jury, has in mind a simple imperative, far removed from that which should motivate the prosecutor.

For the prosecutor's aim is justice. He wins when justice is done and—although it is surely not the outcome he envisions—when it becomes apparent during the trial of a criminal case, a la the celebrated fictional career of Perry Mason, that the accused is innocent of the crime with which he stands charged, the prosecutor has not "lost."

It is otherwise with the civil advocate. His client is in a quarrel, and he is in a fight. The fight may be a more or less genteel one, conducted in an ethical fashion to be sure; but it remains a fight nonetheless: one which, unless settled, will be won by one side of the contest and lost by the other. It is the first imperative of the civil advocate to see that it is his side that wins.

As with all other aspects of his case, counsel brings that proper concern to striking the jury; and, because of it, in doing so he follows one precept and one only: by all fair means, to get a jury which, given his foreknowledge of the case, he believes will in the end be more naturally disposed to favor his side of the dispute than that of his opponent. Within the limits of fair and ethical conduct, his sole concern is, quite properly, that his client gain the case. In such a context as this, we see no occasion to inquire into counsel's motives for his strikes or, at any rate, none that outweighs the value of leaving the common-law peremptory challenge system in undiminished effect. If counsel is astute, he will recognize the obvious truth that there are ordinarily more affinities between a black C.P.A. and a white C.P.A. than there are between a white C.P.A. and a white longshoreman. But even if he is obtuse, it remains that he is only a private person acting obtusely: one for whose actions the state is neither actually nor apparently accountable. That it stands aside, neither approving nor disapproving his actions, and permits him to exercise his three strikes for any reason, for no reason, or even for a bad reason does not implicate the state in his conduct.[13]

13. We note that even if blacks are stricken for an improper reason, the fairness of the civil justice system to the individual litigants would not be compromised. The appellant does not allege, nor could he credibly do so, that he is unable to receive fair consideration from a jury which has only one black in its ranks. Indeed, if a fair cross-section of the community were essential to the proper functioning of the jury, "we would take steps to more nearly ensure that the composition of each individual jury roughly mirrored the community's group mixture." *United States v. Leslie*, 783 F.2d 541 (5th Cir.1986), *vacated*, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987). We see no need for such action at present and do not read *Batson* as requiring it. See *Batson*, 476 U.S., at 85 n. 6, 106 S.Ct., at 1716 n. 6 ("it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society").

Finally, when the civic concerns which underlie the *Strauder* line of cases are removed or greatly lessened, as they are when we shift from service on the criminal jury to service on the civil one, it remains true that the traditional peremptory strike is a leveller of the playing field. It is exercisable against any venireman, high or low, black or white, rich or poor, and without specifying a reason. Thus the peremptory, as traditionally constituted, is a device tending more to equal treatment of all the venire than the strike as reconfigured in *Batson*, which requires counsel to possess (or invent) an articulable reason other than race for challenging a black venireman when a black defendant is being prosecuted, but none for challenging a white one. Thus while he can strike a white venireman for an honest but inarticulable reason—or for a silly one: some always strike barbers; others, housepainters—he must give a reason if he strikes a black one.[14] It is not for us to quarrel with the Supreme Court's *Batson* reconfiguration of the peremptory, but we decline to extend its strictures on this ancient right into the civil area, where the considerations on which *Batson* is based are, if present at all, far weaker than in the criminal field.

The judgment of the district court is therefore

AFFIRMED.

POLITZ, Circuit Judge, with whom PATRICK E. HIGGINBOTHAM, Circuit Judge, joins, specially concurring:

I concur in that portion of the majority opinion which concludes that there is no state action involved in the exercise of peremptory challenges at issue in this civil action. I therefore join therein and in the affirmance of the trial court.

KING, Circuit Judge, concurs in the result.

ALVIN B. RUBIN, Circuit Judge, with whom WISDOM, JOHNSON and JERRE S. WILLIAMS, Circuit Judges, join, dissenting:

The issue before us is whether a party to a civil jury trial who has established a prima facie case that the opposing party is exercising his peremptory challenges to discriminate on the basis of race is entitled by the Constitution to require the challenger to express a reason for exercising the challenges other than racial bias and thus to explain why allowing the challenged jurors to be excused would not constitute a denial of equal protection of the laws. It is not, as the majority assumes, whether "striking a venireman in a civil case because you fear that *he* may tend to favor your opponent over you ... demeans him [or] calls in question the fairness of the civil justice system."[1] It is not whether a litigant's exercise of peremptory challenges can be

14. Although it appears that an eccentric one will do. *See United States v. Romero-Reyna*, 889 F.2d 559 (5th Cir.1989) ("The P Rule").

1. Majority slip opinion at 2459, at —— (emphasis added).

questioned because his lawyer likes or doesn't like the face of a prospective juror, trusts or distrusts fat people or skinny people, favors or disfavors intellectuals, prefers or disdains outdoor types.[2] It is about assuring equal protection of the laws in the face of evidence that the peremptory challenge has been used to deny that constitutional right.

Peremptory challenges were authorized and may be exercised for nearly any reason at all, or for none, for irrational as well as rational reasons. Such challenges are a vital part of trial by jury.[3] They are not, however, guaranteed any role by the Constitution,[4] and are fully subject to its dictates. *Batson v. Kentucky*[5] holds that if, in a criminal case, a prima facie showing is made that the prosecutor is exercising peremptory challenges because of the race of the challenged juror, the defendant may require the court to call on the prosecutor for an explanation so that the court may determine whether the challenges reflect the prejudice that the Fourteenth Amendment was adopted to extirpate. Nothing in the words or purpose of the equal protection clause restricts its application to criminal prosecutions. Accordingly, I would extend *Batson* to civil cases, and I respectfully dissent from the majority's refusal to do so.

I.

Batson does not permit a probe of the motive for every peremptory challenge. The defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of his race from the venire. Second, the defendant may rely on the indisputable fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[6] The defendant must next show that these facts and any other relevant circumstances "raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[7] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. The Court expressed "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors."[8]

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[9] Although prosecutors may not rebut the defendant's

2. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U.Chi.L.Rev. 153, 200-01, 210-11 (1989).

3. *See Swain v. Alabama*, 380 U.S. 202, 212-20, 85 S.Ct. 824, 831-35, 13 L.Ed.2d 759 (1965).

4. *See Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28-30, 63 L.Ed. 1154 (1919); *see also Batson v. Kentucky*, 476 U.S. 79, 91, 106 S.Ct. 1712, 1720, 90 L.Ed.2d 69 (1986) (citing *Stilson*); *Swain*, 380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d 759 (1965) (same); *Holland v. Illinois*, — U.S. —, — - —, 110 S.Ct. 803, 806-810, — L.Ed.2d — (1990) (same).

5. 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

6. 476 U.S. at 96, 106 S.Ct. at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)).

7. 476 U.S. at 96, 106 S.Ct. at 1723.

8. 476 U.S. at 97, 106 S.Ct. at 1723.

9. *Ibid.*

case by merely claiming discrimination, alleging good faith, or stating the discriminatory judgment that black jurors would be more partial to the defendant because of his race, the explanation need not "rise to the level justifying exercise of a challenge for cause."[10] After receiving the State's explanation, the trial court "will have the duty to determine if the defendant has established purposeful discrimination."[11]

Every lawyer who has ever tried a case to a jury knows that peremptory challenges are in practice exercised for reasons that may range from suspicion that an individual venireperson may not favor one's cause to adherence to an idiosyncratic, irrational rule.[12] Federal courts are not inexperienced in evaluating action that is reprobated only if done for a specific reason but is permitted even if done for some other reason, however unfair, or for no reason at all. Thus we decide whether a state employee who has no property right in employment and is otherwise terminable at will has been discharged in retaliation for her exercise of First Amendment rights;[13] whether a private employee who is otherwise subject to discharge without cause has been fired in violation of the Age Discrimination in Employment Act;[14] and in general whether an unconstitutional or illegal purpose was a substantial factor in causing an otherwise valid action.[15]

The *Batson* test is demanding, requiring three specific steps of proof by the defendant before the challenger need utter a word and then permitting the challenger to explain if he wishes. The Supreme Court was careful to select a system of proof that steered between unfairly encouraging meritless claims and imposing a "crippling burden of proof,"[16] one that courts had experienced and ably managed in a number of equal protection contexts.[17] The burden of proof of discrimination rests on the party who claims that he has been denied equal protection. Application of *Batson* to civil cases would not lead courts into a jury-selection morass, but would authorize a simple process readily administered by trial judges.[18]

II.

The equal protection clause of the Fourteenth Amendment forbids "any State ... [to] deny to any person within its jurisdiction the equal protection of the laws."[19] Plainly that clause applies to action by the government, including, by extension under the Fifth Amendment,[20] the federal government, and does not forbid private acts, absent Congressional invocation of the authority granted by Section 5 of the Fourteenth Amendment.

10. 476 U.S. at 97-98, 106 S.Ct. at 1723-24.

11. 476 U.S. at 98, 106 S.Ct. at 1724.

12. *See, e.g., United States v. Romero-Reyna*, 889 F.2d 559 (5th Cir.1989) (The "P" rule).

13. *See, e.g., Perry v. Sinderman*, 408 U.S. 593, 596-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972).

14. 29 U.S.C. § 621 *et seq.*; *see, e.g., Trans World Airlines v. Thurston*, 469 U.S. 111, 124, 105 S.Ct. 613, 623, 83 L.Ed.2d 523 (1985).

15. *See, e.g., Washington v. Davis*, 426 U.S. 229, 239-45, 96 S.Ct. 2040, 2047-50, 48 L.Ed.2d 597 (1976).

16. 476 U.S. at 92, 106 S.Ct. at 1721 (citations omitted).

17. 476 U.S. at 93-98, 106 S.Ct. at 1721-24.

18. *Cf. Thomas v. Moore*, 866 F.2d 803, 805 (5th Cir.1989).

19. U.S. Const. art. XIV § 1.

20. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

A.

Accordingly, the conduct allegedly causing the deprivation of a constitutional right must be "fairly attributable to the state." [21] To determine whether a deprivation is thus fairly attributable to the government, the Supreme Court in *Lugar v. Edmondson Oil Co., Inc.*, set forth a two-part test.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state [sic] or by a person for whom the State is responsible.[22]

The majority concedes, as does the defendant appellee, that this test was met. *Lugar* continues:

> Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.[23]

Explaining the Court's earlier decision in *Flagg Brothers, Inc. v. Brooks*,[24] the *Lugar* opinion illustrates the application of this second principle. Action by a private party pursuant to a statute "*without something more*" is not sufficient to justify a characterization of that party as a "state actor." But the "'something more' . . . might vary with the circumstances of the case." [25] The Court referred to its own use in other cases of a number of different factors or tests in different contexts, referring to the "public function" test, the "state compulsion" test, the "nexus" test, and a "joint action" test.[26] The Court then reserved the question whether those tests are actually different in operation or are simply different ways of "characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation," [27] clearly recognizing that in either event the inquiry into the "something more" required for state action must be based on the specific facts and entire context of a given case. Concluding its summary of the law of state action for the purposes of the equal protection clause, the Court cited with approval the teaching of *Burton v. Wilmington Parking Authority*[28] that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." [29]

Lugar itself is instructive, although the Court limited the extent of its holding [30] and considered the underlying commercial dispute as forming a private core to the conduct at issue.[31] A private creditor had alleged in an ex parte petition its belief that a debtor was disposing of or might dispose of his property in order to defeat his creditors. Acting on that petition, a clerk of the state court issued a writ of attachment that was then executed by the County Sheriff, effectively sequestering the debtor's property although it was left in his possession. The Court held that the creditor's joint participation with state officials was sufficient to characterize the creditor as a state actor for the purposes of the Fourteenth Amendment, the Court of Appeals having erred in "requir[ing] something more than invoking the aid of state officials to take advantage of state-created attachment procedures." [32]

In *Burton*, acknowledged by *Lugar* as addressing the second state-actor inquiry,[33] the Court considered the refusal of the operator-lessee of a restaurant located in a building owned by the state of Delaware to serve a black man. The restaurant's lease required that the space be used for the service of food and/or alcohol and constrained the lessee to abide by all applicable laws, but no state law or official commanded, authorized, or encouraged the lessee's discrimination. The Court found that the lessee was a state actor, as Delaware had "not only made itself a party to the refusal of service, but ha[d] elected to place its power, property and prestige behind the admitted discrimination," thereby denying any characterization of the conduct as purely private.[34] The likeness to the exercise of racially discriminatory peremptory challenges in the marbled halls of the nation's courts need not be stressed.

Reitman v. Mulkey[35] considered what would initially appear to be a more extreme form of state authorization: a California statute that protected the absolute discretion of state property owners to refuse to sell, lease, or rent such property to any persons he might choose. The Court abided by the California Supreme Court's appraisal that the statute was intended to "authorize" privat. racial discrimination in the housing market.[36] No such intent can be ascribed to the origin of the statutory right to peremptory challenges. Nevertheless, if not constrained by *Batson*, the rules governing peremptory strikes vest absolute discretion in the parties. The state thereby guarantees the effect of an objection to seating an otherwise eligible juror by allowing no other to object in turn.

Notwithstanding the Supreme Court's warning in *Burton* that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted,'" [37] the majority considers today's decision to be bound by some controlling precept in the Court's previous decisions. If true, the controlling decisions are uncited. *Blum v. Yaretsky*[38] described itself as "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the

21. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482.

22. 457 U.S. at 937, 102 S.Ct. at 2753.

23. 457 U.S. at 937, 102 S.Ct. at 2754.

24. 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

25. 457 U.S. at 937, 102 S.Ct. at 2754.

26. 457 U.S. at 937, 102 S.Ct. at 2754–55.

27. *Ibid.*

28. 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

29. 457 U.S. at 939, 102 S.Ct. at 2755 (quoting *Burton*, 365 U.S. at 722, 81 S.Ct. at 860).

30. 457 U.S. at 939 n. 21, 102 S.Ct. at 2755 n. 21.

31. *See, e.g.*, 457 U.S. at 941–42, 102 S.Ct. at 2756.

32. *Ibid.*

33. 457 U.S. at 938 n. 19, 102 S.Ct. at 2754 n. 19.

34. 365 U.S. at 725, 81 S.Ct. at 862.

35. 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

36. 387 U.S. at 376, 381, 87 S.Ct. at 1631, 1634.

37. 365 U.S. at 722, 81 S.Ct. at 860 (quoting *Kotch v. Board of River Port Pilot Com'rs*, 330 U.S. 552, 556, 67 S.Ct. 910, 912, 91 L.Ed. 1093 (1947)).

38. 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).

Fourteenth Amendment." [39] Moreover, the action taken failed on the first *Lugar* element, here conceded, there being no suggestion that the nursing home's decisions "were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care." [40] *Evans v. Abney*, [41] also cited by the majority, did not decide a state action question at all, but found that the state had exhibited no racially discriminatory motivation in nullifying a racially discriminatory trust and thereby removing from public use a park that under the trust could be enjoyed only by whites.[42]

B.

Our "necessarily fact-bound inquiry" [43] cannot be accomplished by attempting to cast a single state actor of undisputed stature. The majority considers and rejects in turn the candidacies of the trial judge and the private defendant's trial attorney. It rejects "[t]he merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart [as] an action so minimal in nature that one of less significance can scarcely be imagined." [44] As for the defense counsel, the majority reasons that if *Polk County v. Dodson* [45] decided that a public defender was not a state actor, surely a private defender cannot be.

That a public defender does not, merely by virtue of his employment relationship with the state, act throughout the trial under color of state law, does not mean that the litigant or his lawyer may not, in a specific instance during trial, become a state actor. The rationale of *Polk County* was that "[e]xcept for the source of [the counsel's] payment," the relationship between the indigent defendant and the public defender was "identical to that existing between any other lawyer and client." [46] The public defender is entitled to professional independence and the same freedom of professional judgment as a privately retained lawyer.[47] It does not follow, as the majority assumes, that the public defender or a privately retained lawyer is never a state actor. Indeed, *Polk County* never considered the issue of state action; [48] to the extent that state action would have been lacking, as the *Lugar* Court suggested, it was because the "respondent failed to challenge any rule of conduct or decision for which the State was responsible," [49] a near-verbatim recitation of *Lugar*'s first, here conceded, element.[50]

Examination of *Polk County* suggests instead the importance of considering the challenged conduct in depth, taking into account all its actors in the context in which they act, and avoiding conclusions driven by the characterization of particular players. The exercise of peremptory challenges is not an isolated event but part of

39. 457 U.S. at 1003, 102 S.Ct. at 2785 (citing cases).

40. 457 U.S. at 1005, 102 S.Ct. at 2786.

41. 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970).

42. 396 U.S. at 445, 90 S.Ct. at 633-34.

43. *Lugar*, 457 U.S. at 939, 102 S.Ct. at 2755.

44. Majority slip opinion at 2462, at ——.

45. 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

46. 454 U.S. at 318, 102 S.Ct. at 449.

47. 454 U.S. at 321-22, 102 S.Ct. at 451-52.

48. *See* 454 U.S. at 322 n. 12, 102 S.Ct. at 451-52 n. 12.

49. *Lugar*, 457 U.S. at 935 n. 18, 102 S.Ct. at 2752-53 n. 18.

50. 457 U.S. at 937, 102 S.Ct. at 2753.

an extensive statutory process applicable alike to civil and criminal cases triable by jury. "It is the policy of the United States," Congress has declared, "that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service...." [51] To that end, "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status." [52]

Such provisions are not merely hortatory, but represent part of an active federal scheme to eliminate the discrimination that plagued the key-man system. In order to avoid discrimination in the selection of jury venires each district court must have a plan for random jury selection.[53] Congress has prescribed in some detail the contents of the plan,[54] the preparation of a master juror wheel and the completion of juror qualification forms,[55] the determination of the qualifications for jury service,[56] and the method of selecting and summoning jury panels.[57] When the case is set for trial, potential jurors are summoned by a federal officer, the Clerk of the United States District Court, to report to the United States courthouse. They are paid a per diem fixed by statute for their service, whether selected for a jury or not, becoming at least in some sense public servants charged with important responsibilities.[58] At an appropriate time they are questioned in voir dire by a federal judge and, depending on local practice, by counsel, concerning their qualifications to sit as a juror.

The number of peremptory challenges is determined in the main by statute. In civil cases, each party is provided by statute with three peremptory challenges,[59] while in criminal cases the number varies with the charge: if the offense is capital, 20 per side; if punishable by imprisonment for more than one year, six for the government and 10 for the defendant; and if the offense is punishable less severely, three per side.[60] Nevertheless, the trial judge may affect every aspect of the exercise of peremptory challenges. Most plainly, the judge has broad discretion in determining the appropriate number and allocation of peremptory challenges in all multiparty cases,[61] and may even limit ten criminal codefendants to a total of ten peremptory challenges.[62]

51. 28 U.S.C. § 1861.

52. 28 U.S.C. § 1862.

53. 28 U.S.C. § 1863.

54. *Ibid.*

55. 28 U.S.C. § 1864.

56. 28 U.S.C. § 1865.

57. 28 U.S.C. § 1866.

58. Alschuler, *supra*, at 197.

59. 28 U.S.C. § 1870.

60. Fed.R.Crim.P. 24(b).

61. *See* 28 U.S.C. § 1870; Fed.R.Cr.P. 24(b).

62. *See Gradsky v. United States*, 342 F.2d 147, 152-53 (5th Cir.1965), *vacated on other grounds sub nom. Levine v. United States*, 383 U.S. 265, 86 S.Ct. 925, 15 L.Ed.2d 737 (1966); *see also Moore v. South African Marine Corp., Ltd.*, 469 F.2d 280, 281 (5th Cir. 1972); *Carey v. Lykes Bros. Steamship Co.*, 455 F.2d 1192, 1194 (5th Cir.1972); *United States v. Williams*, 447 F.2d 894, 896-97 (5th Cir.1971); *Nehring v. Compresa Lineas Maritimas Argentinas*, 401 F.2d 767, 767-68 (5th Cir.1968), *cert. denied*, 396 U.S. 819, 90 S.Ct. 55, 24 L.Ed.2d 69 (1969).

Less directly, courts determine the impact of any given number of peremptory strikes. Local court rules control the number of jurors eventually impanelled in civil cases,[63] thereby governing the relative effectiveness of peremptory challenges in determining the composition of the jury. Individual judges control the conduct of voir dire and the information that may be discovered about the venire,[64] thus affecting the exercise of both peremptory challenges and challenges for cause. Of course, by virtue of the trial judge's broad discretion over the exercise of challenges for cause,[65] he may determine the number of jurors who remain eligible for the exercise of peremptory strikes,[66] the court's own strikes,[67] or for eventual impaneling; the Supreme Court has acknowledged that a state may go so far as to require that parties use their peremptory challenges to cure erroneous refusals by the trial court to excuse potential jurors for cause.[68]

The majority's view of the court's "purely ministerial role" in supervising peremptory challenges is perhaps most strikingly belied in the trial judge's broad discretion to determine the manner in which peremptory challenges are exercised: he may decide which side exercises the last challenge,[69] may require simultaneous exercise of challenges by the prosecution and defense,[70] and may even require that one party exercise her challenges first, thereby allowing the other party to then act with full knowledge of her opponent's choices.[71]

Peremptory challenges are not self-executing but are effected by the action of the judge who excuses the prospective juror. The court, and hence, "the State[,] is not merely an observer of the discrimination, but a significant participant.... The only thing the State does not do is make the decision to discriminate. Everything else is done or supplied by the State," [72] a New York state judge has observed. By presiding over jury selection in his official, governmental capacity, a judge is intimately involved in the process that Tocqueville termed America's "greatest advantage" in "rub[bing] off th[e] private selfishness which is the rust of society." [73] By carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval. Thus the private litigant employing per-

63. *See Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).

64. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188-89, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981).

65. *See United States v. Jones*, 712 F.2d 115, 121 (5th Cir.1983).

66. *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976); *but see United States v. Garza*, 574 F.2d 298, 302-03 (5th Cir.1978); *Stewart v. Texas & Pacific Rwy. Co.*, 278 F.2d 676, 677-78 (5th Cir.1960).

67. *See United States v. Calhoun*, 542 F.2d 1094, 1103 (9th Cir.1976) (citing *United States v. Bailey*, 468 F.2d 652, 658, *aff'd on other grounds*, 480 F.2d 518 (5th Cir.1973) (en banc)), *cert. denied*, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed.2d 781 (1977).

68. *See Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 2279, 101 L.Ed.2d 80 (1988).

69. *See United States v. Durham*, 587 F.2d 799, 801 (5th Cir.1979).

70. *See United States v. Sarris*, 632 F.2d 1341, 1343 (5th Cir. Unit A 1980).

71. *See Gafford v. Star Fish & Oyster Co.*, 475 F.2d 767, 767-68 (5th Cir.1973).

72. *People v. Gary M.*, 138 Misc.2d 1081, 526 N.Y.S.2d 986, 994 (1988).

73. 1 A. Tocqueville, Democracy in America 295-96 (Vintage Books ed. 1945).

emptory challenges on the basis of race has "acted together with or obtained significant aid from state officials" [74] in a manner sufficient to meet the second part of the *Lugar* test. "A state should not be permitted to delegate the power to determine the composition of official tribunals and then disclaim responsibility for the predictably discriminatory way in which this authority is exercised." [75] On its face, it is discriminatory state action for the government itself to establish and maintain a system of jury selection that authorizes blatant racial discrimination by litigants using the courts set up by, paid for, and operated by the government.

III.

There are manifest differences between a criminal prosecution and a civil action and the degree of governmental involvement in each. In a criminal prosecution, the government, state or federal, initiates the proceeding against an unwilling defendant. The government prosecutes, and the full weight of the state's panoply of personnel and resources is brought to bear against the accused. In a civil matter to which the state is not a party, the plaintiff initiates the proceeding and private parties are matched against each other.

Neither the equal protection clause nor the rationale of the *Batson* case, however, is limited to the state's involvement in criminal prosecutions. The principle of equal protection applies to governmental action in civil as well as criminal matters,[76] federal as well as state. While the Supreme Court in *Batson* considered only a defendant in a criminal case, its guiding precept was that a " 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.' " [78] Referring to its contemporary appraisal of the Fourteenth Amendment in *Strauder v. West Virginia*,[79] the Court endorsed the explanation that "the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race." [80]

A.

The fundaments upon which *Batson* rests discourage any suggestion that its development is rooted solely on the criminal context. *Strauder* determined that a black defendant had been denied the equal protection of West Virginia's laws when he was criminally convicted by a jury from which members of his race had been purposefully excluded. The exclusion of blacks from the jury was not the result of circumstances peculiar to his trial, his prosecutors, or the nature of his offense, but followed from a West Virginia statute limiting eligibility for service on all grand and

74. *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754.

75. Alschuler, *supra*, at 197.

76. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886).

77. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

78. *Batson*, 476 U.S. at 84, 106 S.Ct. at 1716 (quoting *Swain v. Alabama*, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-27, 13 L.Ed.2d 759 (1965)); *see also* 476 U.S. at 84 n. 3, 106 S.Ct. at 1716 n. 3 (citing cases).

79. 100 U.S. (10 Otto) 303, 25 L.Ed. 664 (1880).

80. 476 U.S. at 85, 106 S.Ct. at 1716; *see also Holland v. Illinois*, 108 S.Ct. 803, 810-11 ("the systematic exclusion of blacks from the jury system through peremptory challenges" is "obviously" unlawful).

petit juries to white males.[81] The Court observed that the words of the Fourteenth Amendment:

> contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[82]

It found the racial discrimination required by West Virginia to contradict "[t]he very idea of a jury," [83] obstructed the operation of an amendment designed "to strike down all possible legal discriminations" against blacks,[84] and held that such a law must yield to the federal statute permitting removal of civil suits and criminal prosecutions against persons denied their civil rights.[85]

The *Swain* Court surveyed the exercise of the Alabama struck-jury system in both the civil and criminal contexts, comparing it to the use of the peremptory challenge in the same aspects of other state systems.[86] After rejecting the argument that the Constitution "require[d] an examination of the prosecutor's reasons for the exercise of his challenges in any given case," [87] the Court considered Swain's broader claim that "there has never been a Negro on a petit jury in either a civil or criminal case in Talladega County" and that in criminal cases prosecutors had used their peremptory strikes to prevent blacks on the jury venire from sitting on the petit jury.[88] The Court concluded that although such a systematic practice would present a prima facie case under the Fourteenth Amendment,[89] Swain had failed to adequately allege the prosecutor's culpability in the complete absence of any blacks from the county's petit jurors, in part because he had failed to account for the participation of defense counsel in the result.[90]

Swain's ambit was necessarily confined to the patterns and practices of prosecutors, and its standard of proof could not easily be extended to contemplate the constitutionally violative use of peremptory challenges by less frequent participants in the jury system, such as defense attorneys or counsel for civil plaintiffs. At the same time, it contemplated the inspection and discouragement of discriminatory practices in both civil and criminal employments of the jury venire.[91] *Batson*, by establishing a standard of proof that allows case-by-case inspection of the use of peremptory challenges, simultaneously commands full adoption of the promise of equal protection in every use of the venire. The universality of *Batson* was evident not only in its invocation of the equal protection clause, but also in its reliance, echoing *Swain*, on systems of proof founded primarily in the civil context.[92]

81. 100 U.S. (10 Otto) at 305.
82. 100 U.S. (10 Otto) at 307–08.
83. 100 U.S. (10 Otto) at 308; *see also Holland v. Illinois*, 108 S.Ct. at 806–07 (citing *Strauder*); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946).
84. 100 U.S. (10 Otto) at 310.
85. 100 U.S. (10 Otto) at 311–12.
86. 380 U.S. at 205–10, 217–18, 85 S.Ct. at 827–30, 834–35.
87. 380 U.S. at 222, 86 S.Ct. at 837.
88. 380 U.S. at 223, 85 S.Ct. at 837.
89. 380 U.S. at 224, 85 S.Ct. at 838.
90. 380 U.S. at 224–227, 86 S.Ct. at 838–39.
91. *See King v. County of Nassau*, 581 F.Supp. 493, 499–500 (E.D.N.Y.1984); *see also Clark v. City of Bridgeport*, 645 F.Supp. 890, 895 (D.Conn.1986) (citing *Swain* and *King*).

The judgment in *Batson* is but a continuation of the effort the Supreme Court began almost a century ago to eradicate the vice of racial discrimination in jury selection, extending the principles it had applied in *Strauder* and in *Swain*. As *Batson* spoke of *Strauder*, "[t]hat decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." [93] While the history of peremptory challenges may have begun before the Battle of Hastings, the federal governmental interest in eradicating racial discrimination began only after Appomatox, and the salutary effect of the equal protection clause did not end with *Batson* in 1986. As *Holland v. Illinois*[94] most recently emphasized, the Fourteenth Amendment contains an "intransigent prohibition of racial discrimination" applicable to all aspects of the jury system.[95] We must not now retreat.

B.

The only other circuits confronting the question of *Batson*'s application to civil cases have held that it applies with equal force in that context.[96] The Eleventh Circuit, in *Fludd v. Dykes*,[97] held that "the policies underlying the Supreme Court's decision in *Batson* are equally applicable in the civil context," explaining that the wrong done to an individual litigant's constitutional rights and the minimal burden imposed by *Batson* were no different in the civil setting.[98] Reaching the same result the Eighth Circuit in *Reynolds v. City of Little Rock*,[99] noted that "the Equal Protection Clause of the Fourteenth Amendment does not contain any latent distinction between criminal and civil legal process," [100] and that "[t]he more natural reading of *Batson* is that its rule of non-discrimination applies ... without distinguishing criminal and civil legal proceedings." [101]

The concerns undergirding the *Batson* holding that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure" [102] apply to civil no less than criminal proceedings. The *Batson* opinion itself provides the explanation: "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try," [103] and, we add, the private litigant whose dispute they are called to adjudicate, but also insults the challenged

92. *Cf. Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir.1990).
93. 476 U.S. at 85, 106 S.Ct. at 1716.
94. — U.S. —, 110 S.Ct. 803, — L.Ed.2d — (1990).
95. *Ibid.*
96. The Fourth, Sixth, and Seventh Circuits have declined to resolve the issue. *See Nowlin v. General Tel. Co. of the Southeast, S.C., Lake City Dist.*, 892 F.2d 1041 (4th Cir.1989) (unpublished opinion); *Robinson v. Quick*, 875 F.2d 867 (6th Cir.1989) (unpublished opinion); *Boykin v. Hamilton County Bd. of Educ.*, 869 F.2d 1488 (6th Cir.1989) (unpublished opinion); *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir.1988).
97. 863 F.2d 822 (11th Cir.1989).
98. *Id.* at 828–29.
99. 893 F.2d 1004.
100. *Ibid.*
101. *Ibid.*
102. 476 U.S. at 85, 106 S.Ct. at 1716.
103. 476 U.S. at 87, 106 S.Ct. at 1718.

venireperson. "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply 'is unrelated to his fitness as a juror'.... The harm from discriminatory jury selection, indeed, extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." [104]

Peremptory challenges occupy as important a position in the trial of civil cases as they do in criminal cases, and denying the application of *Batson* in the civil setting would erect an unconstitutionally adventitious division on the operations of jury trial procedure. The same member of the community called for jury service who would enjoy protection against racial discrimination if she were assigned to a criminal venire would be subject to the exercise of a blatantly discriminatory strike if she is first asked to fulfill her duty as a civil venireperson.[105] The same Assistant United States Attorney or State District Attorney forbidden by *Batson* from infringing on the rights of a criminal defendant or a venire member called to try him would infringe on the apparently contentless rights of civil defendant and a civil venire member.[106]

Racial prejudice has no more place in the federal courtroom on the days the court is conducting a civil trial than it does on the days when the same judge, seated at the same bench, in the same courtroom, before the same American flag, is conducting a criminal trial.[107] As the Supreme Court remarked in a related context,

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race ...[108]

For the majority, however, there remains something ineffably different about civil proceedings, a difference apparently material to the racially discriminatory exercise of peremptory strikes; "fundamentally, the entire purpose of a criminal prosecution is to enforce the purposes of the state, whereas the state has no purpose at all in civil litigation beyond preempting the use of private force to settle disputes—a purpose that is as well served, if the parties consent, by an arbitration to which the state is no party." [109] Leaving aside for the moment those civil cases to which the government is a party,[110] and differentiating the issue of state action, the majority's assessment ignores the myriad ways in which the state and society evince a genuinely *civil*, civic, and non-privatistic interest in civil litigation. The Seventh Amendment preserves the right of trial by jury in suits at common law in which the value in controversy exceeds twenty dollars, thus interposing the civil jury as an important constraint on the power of government.[111] Such civil jury cases are administered by the government and conscript citizens to serve as jurors; last year federal district courts tried more civil jury cases than criminal jury cases.[112] Nor does the nominal identification of the parties do justice to the nature of the dispute: The United States, for example, not infrequently participates in civil suits as an *amicus curiae*,[113] and private persons are authorized by Congress to act on behalf of themselves and the United States as "private attorneys general" and *qui tam* plaintiffs.[114] Congress has also authorized private claimants to seek redress for injuries otherwise compensable in common law to promote the public interests embodied in statutes such as the Clayton Antitrust Act [115] and Title VII of the Civil Rights Act of 1964.[116] In federal courts, at least, the only major category of cases in which federal governmental interest is minor is diversity, and in those the Constitution itself requires that the federal judiciary provide a forum that is not only neutral but equally protective of individual rights.[117]

104. *Ibid.* (citations and portions of text omitted); *see also* 28 U.S.C. § 1862.

105. *Cf.* 28 U.S.C. § 1866(c), (e), (f).

106. *See* 28 U.S.C. § 547.

107. *See Maloney v. Washington*, 690 F.Supp. 687 (N.D.Ill.1988) (memorandum opinion), *vacated on other grounds, Maloney v. Plunkett*, 854 F.2d 152 (7th Cir.1988).

108. *Burton v. Wilmington Parking Authority*, 365 U.S. at 724, 81 S.Ct. at 861.

109. Majority slip opinion at 2464, at ——.

110. *See infra* notes 118–20 and accompanying text.

C.

Although the majority finds "no occasion to consider the situation presented where the state appears as a civil litigant," [118] such an occasion will necessarily disturb its intended limitation of *Batson* to the criminal context. When government is a litigant, it becomes clear that "[t]he distinction that is crucial for application of equal-protection principles is that between governmental actors and private actors." [119] Pursuing the criminal-civil distinction under such circumstances would seemingly license the state's discriminatory exercise of peremptory challenges in a manner "[ ]related to the outcome of the particular [civil] case on trial" [120] if it chose to seek civil sanctions rather than criminal against a particular defendant. The Fourteenth Amendment (and, for that matter, the Eighth) does not admit of such a subtle understanding of civil rights. Once such a case is considered, the criminal-civil distinction collapses, leaving only the examination of state involvement in those cases to which the government is not a party, such as the present one. The "slippery slope"

111. *See* Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn.L.Rev. 639, 644, 708–10 (1973); Note, The Civil Implications of *Batson v. Kentucky* and *State v. Gilmore*: A Further Look at Limitations on the Peremptory Challenge, 40 Rutgers L.Rev. 891, 946–48 (1988).

112. Report of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts table C7 at 225 (1988).

113. *See, e.g.*, Sup.Ct.R. 36.

114. *See* Caminker, The Constitutionality of *Qui Tam* Actions, 99 Yale L.J. 341, 342–44 (1989).

115. 15 U.S.C. §§ 15, 26.

116. 42 U.S.C. § 2000e–5. *See generally* Stewart & Sunstein, Public Programs and Private Rights, 95 Harv.L.Rev. 1195 (1982).

117. U.S. Const. art. III, § 2, cl. 1.

118. Majority slip opinion at 2463 n. 10, at —— n. 10.

119. *Reynolds v. City of Little Rock*; *see also Fludd*, 863 F.2d at 828–29, *Clark*, 645 F.Supp. at 894–96.

120. *Swain*, 380 U.S. at 224, 85 S.Ct. at 838.

that concerns the majority,[121] whether the product of *Batson*'s extension to other protected groups or its extension to civil jury trials, must simply be considered a necessary product of the scope of the equal protection clause, and cannot be used to suggest a limit to its dictates or a retreat from the logic of *Batson*.

IV.

The use of peremptory challenges solely on the basis of racial animus, that is, as a device to bar a citizen from trial by a jury of all of his peers, save those of a certain race, cannot be justified by its history, ancient or modern, or by its utility to lawyers in attempting to win lawsuits. Racial prejudice was sanctioned by both the original Constitution and the Bill of Rights. The enactment of the equal protection clause marked the beginning of a new era, an era in which it was to be hoped that the color of a person's skin would not affect his legal rights.

The requirement of state action is in large part intended to "require the courts to respect the limits of their own power as directed against state governments and private interests." [122] "The petit jury," in turn, "has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." [123] Edmonson's invocation of his constitutional rights compels us to acknowledge the scope of judicial culpability in administering the racially discriminatory exercise of peremptory strikes against what remains, at least if unblemished, a cherished bulwark against every misuse of authority. We must take another step toward the goal of eradicating racial prejudice by eliminating the shameful practice of permitting a federal statute to be employed in a trial in a federal courtroom as a weapon of discrimination. I regret that the majority cannot yet see that to permit a person to be rejected from a jury solely because of the color of his skin rejects the promise upon which this nation's independence was based and the guarantee that the Fourteenth Amendment provides: that all persons are created equal. In God's sight. In human right. And in regard to service on a federal jury.

121. Majority slip opinion at 2461-2462, at ——-—— n. 6.

122. *Lugar*, 457 U.S. at 936-37, 102 S.Ct. at 2753.

123. *Batson*, 476 U.S. at 86, 106 S.Ct. at 1717 (citations omitted).

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87-4804

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 87-4804

THADDEUS DONALD EDMONSON,

Plaintiff-Appellant

VERSUS

LEESVILLE CONCRETE COMPANY, INC.

Defendant-Appellee

U.S. COURT OF APPEALS
FILED
JUN 1 1988
GILBERT F. GANUCHEAU
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

RECORD EXCERPTS

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Copy of this paper to Judges listed below.

Hearing Panel JMW JEG-SBR	Hearing Date 8/2/88
Writing Judge	Opinion Filed

RECORD EXCERPTS

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12-22-86	--	CAL T 03-23-87 before EEV (ps) NOE
01-12-87	29	NOD by Video Tape (P) of Dr. Bruce Razza 2-19-87 @ 2:30 P.M. (dd)
01-09-87	30	NOD by Written Direct Questions (P) of custodian of records of Byrd Memorial Hospital 2-9-87 @ 1:00 P.M.; custodian of records of Dr. Gregory D. Lord 2-9-87 @ 2:15 P.M.; custodian of records of Dr. David H. Steiner 2-9-87 @ 3:30 P.M.; custodian of records of Lake Charles Memorial Hospital 2-10-87 @ 1:00 P.M.; custodian of records of Dr. R. Dale Bernauer 2-10-87 @ 2:15 P. custodian of records of Dr. Fayez Shamieh 2-10-87 @ 3:30 P.M.; custodian of records of St. Charles General Hospital 2-11-87 @ 1:00 P.M. (dd)
01-13-87	31	NOD (D) of Charles O. Bettinger III 1-23-87 @ 3:00 P.M. (dd)
1-13-87	32	NOD (D) of Thaddeus Donald Edmonson 1-21-87 @ 10:30 A.M. (dd)
02-05-87	33	NOD (P) of Dr. Percy Miller 2-12-87 @ 1:00 P.M.; Dr. Kenneth Boudreaux 2-20-87 @ 11:00 A.M.; Dr. George Hearn 2-26-87 @ 1:00 P.M.; Leonard Michiels 2-26-87 @ 2:00 P.M. (dd)
2-13-87	34	NOD (D) of Crystal Edmonson 3-6-87 @ 4:00 PM (dd)
	35	NOD (D) by video of Dr. J. Lane Sauls 3-6-87 @ 1:30 PM; Dr. Walter T. Snow 3-6- @ 3:00 PM; Dr. Gregory D. Lord 3-11-87 @ 2:00 PM; Dr. Fayez Shamieh 3-12-8 @ 1:30 PM and Dr. R. Dale Bernauer 3-18-87 @ 4:00 PM (dd)
02-17-87	36	NOD (P) by video of Dr. William F. Krooss II 3-6-87 @ 10:30 A.M. (dd)
02-18-87	37	PT (P) STMT (dd)

(continued next page)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 84-287
THADDEUS DONALD EDMONSON	LEESVILLE CONCRETE CO., INC.	PAGE 3 OF ___ PAG

DATE	NR.	PROCEEDINGS
02-19-87	38	PT (Leesville Concrete) STMT (dd)
	39	PT (American General Fire) STMT (dd)
02-20-87	40	NOD by Video (P) of Charles A. Schiber, M.S., 3-9-87 @ 1:00 P.M. (dd)
02-24-87	41-42	MOTION (P) for continuance of T, w/ ORDER granting same. T upset & is to be refixed @ a later date. (EEV/tm)NOE/ln
03-02-87	43	NOD by Video Tape (P) of Dr. Bruce Razza 4-28-87 @ 3:30 P.M. (dd)
4-27-87	---	CAL T w/jury 7-27-87 (dd) NOE
04-28-87	44	REFUSAL Letter to Atty Williams of Notice to Take Video Tape Depo. for failure to comply w/Local Rule 30(b) (4) (dd)
05-13-87	45	AMENDED NOD by Video Tape (P) of Dr. Bruce Razza 6-11-87 @ 4:30 PM or alternat: 7-9-87 @ 4:30 PM (dd)
05-14-87	46	NOD by Video Tape (P) of Charles A.Schiber, M.S. 6-15-87 @ 1:00 PM (dd)
06-17-87	47	NOD By Video Tape (D) of Fayez Shamieh, M.D. 7-23-87 @ 1:30 PM (dd)
06-26-87	48	PT STMT (Leesville Concrete) (dd)
	48(A)	PT STMT (P) (dd)
07-07-87	49-51	MOTION (D) for Issuance of Order Authorizing Certification of Military Personne & Medical Records for Use at Trial w/ORDER-Director, Nat'l Personnel Records Center (Military Personnel Records) furnish copies of all military personnel and related medical records of P to D's counsel, Honeycutt; such records to be certified for admission into evidence at trial (EEV/dd) NOE/ln
07-09-87	52	REFUSAL LETTER to Atty Doyle returning Motion to Enroll Counsel for failure to comply w/LR 6(b) (sp)
2-13-87	53	NOD (D) of Dr. C. R. Morin 7-21-87 @ 10:00 AM; Dr. Clark A. Gunderson 7-21-87 @ 5:00 PM (dd)
07-14-87	54	WILL CALL WITNESS LIST (D) (dd)
07-15-87	55-56	MOTION (Atty Doyle) to Enroll Counsel ref. to EEV (dd)
07-14-87	57	EXHIBIT LIST (Leesville Concrete Co., Inc.) (dd)
07-15-87	58	NOD (P) of Dr. Paul Ware 7-22-87 @ 11:00 AM (dd)
07-15-87	59	WITNESS LIST (P) (dd)
	60	REQUESTED JURY CHARGES (P) (dd)
	61	EXHIBIT LIST (P) (dd)
07-16-87	62	PROPOSED JURY INSTRUCTIONS (D) (dd)
07-16-87	56*	ORDER-James B. Doyle is enrolled as additional counsel for P (EEV/dd)
	63	NOD (P) of Peggy Kelley 7-22-87 @ 1:30 PM; Gary Wright 7-22-87 @ 2:30 PM; Mrs. Fred Bolgiano 7-23-87 @ 2:30 PM; Samuel James 7-23-87 @ 3:00 PM; Rebecca Broussard 7-23-87 @ 3:30 PM (dd)
07-21-87	64	STIPULATION (Joint) (dd)
	65-67	MOTION (D) in Limine-noticed to be referred to merits at T of 7-27-87 or alternatively for hearing before JTT,JR 8-25-87 (dd) NOE
7-22-87	68-69	MOTION (D) to Quash the Taking of Depos. ref. to EEV per converation w/Joe, Law Clerk, LCO (dd)
7-24-87	70	MEMO (P) in Oppo. to D's Motion in Limine (dd)
7-27-87	68*	ORDER-Ruled on record (EEV/dd) NOE/ln
7-28-87	71	STIPULATION (Joint) (dd) X-FOLDER
7-27-87	72	MINUTES: T w/jury (1st Day): (EEV/dd) NOE/jb
7-28-87	73	MINUTES: T w/jury (2nd Day) (EEV/dd) NOE/jb
7-29-87	74	MINUTES: T w/jury (3rd Day) (EEV/dd) NOE/jb
7-30-87	75	MINUTES: T w/jury (4th Day) (EEV/dd) NOE/jb
31-87	76	MINUTES: T w/jury (5th Day) (EEV/dd) NOE/jb
8-05-87	77	ORDER FOR JURY MEAL-USM ordered to furnish food & beverage to jury during their deliberations at government expense (EEV/dd) NOE/jb

(OVER)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 84-d
THADDEUS DONALD EDMONSON	LEESVILLE CONCRETE CO., INC.	PAGE 4 OF ___ PAG

DATE	NR.	PROCEEDINGS
08-03-87	78	MINUTES-T w/jury (6th Day) (EEV/dd) NOE/jb
08-04-87	79	MINUTES-T w/jury (7th Day) (EEV/dd) NOE/jb
08-05-87	80	MINUTES-T w/jury (8th Day) (EEV/dd) NOE/jb
	81	SPECIAL Interrogatories to Jury (dd)
	82	COURT'S Instructions to Jury (dd)
	83	SPECIAL Interrogatories to Jury (dd)
	84	WITNESS LIST (P/D) (dd)
	85	WITNESS LIST (P/D) (dd)
	86	EXHIBIT LIST (P) (dd)
	87	EXHIBIT LIST (P) (dd)
	88	EXHIBIT LIST (P) (dd)
	89	EXHIBIT LIST (D) (dd)
	90	EXHIBIT LIST (D) (dd)
	91	EXHIBIT LIST (D) (dd)
	92	EXHIBIT LIST (D) (dd)
09-28-87	93	JUDGMENT-verdict of jury is made Judgment of Ct. and accordingly Leesville Concrete Co., Inc. is cast in judgment for the sum of $18,000 together w/interest thereon from date of judicial demand until paid w/costs to be shared in equal amounts by P and intervenor together w/defendant; intervenc American General Fire & Casualty Co. is entitled to be reimbursed for medical expenses and weekly benefits by preference and priority from the proceeds of the judgment in sum of $18,000 together w/legal interest from d of judicial demand (EEV/dd) DKT'D 9-29-87
		CLOSED 10-28-87 09-28-87 3609 9 7
10-09-87	94-95	MOTION (American General Fire & Casualty Co) & Order to Enroll and Motion for Additional Time to File Brief - Joe A. Brame allowed to enroll as add'tl counsel for American General Fire and they are allowed until 10-19-87 w/in which to file brief in support of Motions (EEV/dd) NOE/ln 1-18 1 04-09-85 07-27-87 08-05-87
10-09-87	96	MOTION (American General Fire & Casualty Co.) for Judgment NOV and for New Trial (dd)
10-13-87	97-98	MOTION (American General) to W/Draw w/ORDER-#96 allowed w/drawn (EEV/dd) NOE/ln
10-15-87	99-100	MOTION (Attys Williams & Doyle) to W/Draw as Counsel of Record w/ORDER-GRANTED (EEV/dd) NOE/ln
10-30-87	101-102	MOTION (D) to Deposit Funds ref. to EEV (dd)
10-29-87	103	NOTICE OF APPEAL(P) from judgment entered 9-29-87. APPEAL FEES PAID. NOE 11-2-87 to Ct.A.;Patrick w/trans. ord.;Williams & Doyle;McCain;Boneycutt,Jr. EEV; Benoit;J. Williams(cm)
11-02-87	102*	ORDER-Clerk accept from International Ins. Co. for the account of Leesville Concrete Co., Inc. the sum of $23,562.88 (EEV/dd) NOE/ln
10-29-87	104-105	MOTION (P) to Enroll as Counsel w/ORDER-Robert E. Patrick is enrolled as counsel (EEV/dd) NOE/ln
11-13-87	106	AFFIDAVIT (Leesville Concrete Co., Inc. upon James E. Williams) of Service 11-4-87 (dd)
	107	AFFIDAVIT (Leesville Concrete Co., Inc. upon James E. Doyle) of Service 11-4-87
	108	AFFIDAVIT (Leesville Concrete Co., Inc. upon David B. McCain) of Service 11-4-87 (dd)
	109	AFFIDAVIT (Leesville Concrete Co., Inc. upon Thaddeus Donald Edmonson) 11-4-87 (dd)
	110	AFFIDAVIT (Leesville Concrete Co., Inc. upon Robert E. Patrick) of Service 11-4-87 (dd)

DC 111A (Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 84-2871
THADDEUS DONALD EDMONSON	LEESVILLE CONCRETE CO., INC.	PAGE 5 OF ___ PAG

DATE	NR.	PROCEEDINGS
11-19-87	111-112	MOTION(P & American General Fire & Casualty Co.) to Withdraw Funds w/ORDER granting same (EEV/ps) NOE/ln
12-1-87	113	TRANSCRIPT ORDER: ordering trans. of proceedings (Cm)
12-18-87	114	ORDER from Ct.A. issued as MANDATE: Appeal DISMISSED for failure of appellant to make financial arrangements w/Ct. Reporter. NOE 12-21-87 to EEV; Benoit(cm)

United States District Court
Western District of Louisiana
Lake Charles Division

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
SEP 23 1987
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

THADDEUS DONALD EDMONSON

VERSUS

LEESVILLE CONCRETE COMPANY, INC.

CIVIL ACTION

NO. CV84-2871
Judge Veron

RECEIVED
SEP 30 1987
WOODLEY, BARNETT, COX
WILLIAMS and FENET

J U D G M E N T

The above numbered and entitled cause, having come on for trial by jury pursuant to regular assignment with plaintiff, defendant and intervenor present or represented; and the jury, after hearing the evidence, the argument of counsel and the instruction of the Trial Court, and having reached its verdict as rendered and signed on August 5, 1987, in the words and figures as follows:

1. Do you find from a preponderance of the evidence that Leesville Concrete Company, Inc. was negligent in the manner claimed by Thaddeus Donald Edmonson and that such negligence was a legal cause of injury to Mr. Edmonson?

   Answer Yes or No Yes

2. If you have answered "Yes" to Question 1, do you find from a preponderance of the evidence that Thaddeus Donald Edmonson was himself negligent in the manner claimed by Leesville Concrete Company, Inc. and that such negligence was a legal cause of his own injuries?

   Answer Yes or No Yes

3. From a preponderance of the evidence, what proportion or percentage did the negligence of the respective parties, if any, legally cause Thaddeus Donald Edmonson's accident and injuries?

Leesville Concrete Company, Inc.		20%
Thaddeus Donald Edmonson		80%
Total		100%

4. What is the total amount of damages, if any, that you find Thaddeus Donald Edmonson suffered as a result of the accident and injuries?

a)	Loss of Past Earnings	$ 25,000.00
b)	Loss of Future Earnings	$ 0
c)	Amount of past medical and hospital expenses incurred by Thaddeus Donald Edmonson as a result of the fault of the defendant	$ 1,200.00
d)	Amount of future medical and hospital expenses to be incurred by Thaddeus Donald Edmonson	$ 0
e)	Amount of General Damages	$ 63,800.00

Ray L. Smith
Foreperson

IT IS ORDERED, ADJUDGED AND DECREED that the said verdict of the jury be and is hereby made the Judgment of this Court, and accordingly, the defendant, LEESVILLE CONCRETE COMPANY, INC., is hereby cast in Judgment for the sum of EIGHTEEN THOUSAND AND NO/100 ($18,000.00) DOLLARS, together with legal interest thereon from date of judicial demand until paid with costs to be shared in equal amounts by plaintiff and intervenor together with defendant.

IT IS ORDERED, ADJUDGED AND DECREED that the intervenor, AMERICAN GENERAL FIRE & CASUALTY COMPANY, is entitled to be reimbursed for medical expenses and weekly benefits by preference and priority from the proceeds of the judgment in the sum of EIGHTEEN THOUSAND AND NO/100 ($18,000.00) DOLLARS together with legal interest from date of judicial demand.

JUDGMENT READ AND SIGNED in Lake Charles, Louisiana, this 28th day of September, 1987.

Earl E. Veron
JUDGE, UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

COPY SENT
DATE 9-28-87
BY kn
TO: Honeycutt
McCain.
Williams/Doyle

James S. Williams
JAMES E. WILLIAMS, of
Woodley, Barnett, Williams,
Fenet, Palmer & Pitre
500 Kirby Street
Post Office Drawer EE
Lake Charles, LA 70602
Attorney for Plaintiff

John B. Honeycutt
JOHN B. HONEYCUTT, JR., of
Percy, Smith, Poore & Honeycutt
Post Office Box 1632
Alexandria, LA 71309
Attorneys for Defendant

David McCain
DAVID McCAIN, of
Brame, Bergstedt & Brame
Post Office Box 1844
Lake Charles, LA 70602
Attorneys for Intervenor

Judgment Entered 9-29-87
By Donna Deason
Copy To Williams & Doyle
McCain
Honeycutt, Jr.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

****

THADDEUS DONALD EDMONSON

VERSUS

CA. NO. 84-2871

LEESVILLE CONCRETE COMPANY, INC

****

PORTION OF PROCEEDINGS HAD BEFORE THE HONORABLE EARL E. VERON, UNITED STATES DISTRICT JUDGE, AND A JURY, AT LAKE CHARLES, LOUISIANA, BEGINNING ON THE 27TH DAY OF JULY, 1987.

APPEARANCES:

WOODLEY, BARNETT, WILLIAMS, FENET & PALMER, ATTORNEYS FOR PLAINTIFF
P. O. DRAWER EE
LAKE CHARLES, LA. 70602
BY JAMES B. DOYLE AND JOE MORGAN, JR., OF COUNSEL

PERCY, SMITH, WILSON, FOOTE, WALKER & HONEYCUTT, ATTORNEYS FOR DEFENDANT
P. O. BOX 1632
ALEXANDRIA, LA. 71309
BY JOHN B. HONEYCUTT, JR., OF COUNSEL

BRAME, BERGSTEDT & BRAME, FOR AMERICAN GENERAL
P. O. BOX 1844
LAKE CHARLES, LA. 70602
BY DAVID B. MCCAIN, OF COUNSEL

JOE D. WILLIAMS, OFFICIAL REPORTER
P. O. BOX 463
LAKE CHARLES, LA. 70602

MONDAY, JULY 27, 1987

MORNING SESSION

(PROCEEDINGS.)

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. ALL RIGHT. LET ME APOLOGIZE TO YOU FOR COMING IN A LITTLE LATE. WE WERE TAKING CARE OF BUSINESS. THAT IS STILL NO REASON WHY WE SHOULDN'T HAVE BEEN HERE. AND WE ARE GOING TO TRY TO MAKE IT UP TO YOU. NOW, WE ARE GOING TO BE TRYING ONE CASE, AND ONE CASE ONLY. IF YOU ARE NOT PICKED AS A JUROR IN THAT CASE, YOU WILL BE FREE TO GO HOME. ADDITIONALLY, IF YOU ARE PICKED AS A JUROR IN THIS CASE, WE ARE NOT GOING TO KEEP YOU OVERNIGHT. YOU CAN GO HOME FOR LUNCH. I WILL TELL YOU WHEN TO GO HOME THIS EVENING, AND TELL YOU WHEN TO COME BACK TOMORROW AND SO FORTH AND SO ON. THE ONLY TIME YOU WILL BE REQUIRED TO STAY HERE, OTHER THAN WHEN COURT IS IN SESSION, IS WHEN THE CASE IS GIVEN TO YOU. NOW, MRS. BENOIT, WOULD YOU SWEAR ALL THE PROSPECTIVE JURORS?

(WHEREUPON ALL PROSPECTIVE JURORS WERE DULY SWORN ON VOIR DIRE.)

THE COURT: ALL RIGHT. NOW, LADIES AND GENTLEMEN, I WILL NOW STATE TO YOU THE STATUTORY REQUIREMENTS THAT YOU MUST HAVE IN ORDER TO SERVE AS A JUROR. AT THE CONCLUSION, IF YOU LACK ANY ONE OR MORE OF THESE QUALIFICATIONS, I THEN ASK YOU TO RAISE YOUR HAND. YOU MUST BE A CITIZEN OF THE UNITED STATES, AND YOU MUST HAVE RESIDED

IN THE LAKE CHARLES DIVISION OF THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF LOUISIANA, FOR THE PRECEDING TWELVE MONTHS. THE LAKE CHARLES DIVISION COMPRISES THE FOLLOWING PARISHES, CALCASIEU, CAMERON, JEFFERSON DAVIS, BEAUREGARD, ALLEN AND VERNON. IF YOU HAVE LIVED IN THAT SIX PARISH GEOGRAPHICAL AREA, ALTHOUGH YOU MAY HAVE MOVED FROM ONE PARISH TO ANOTHER, YOU WOULD BE QUALIFIED. YOU MUST BE EIGHTEEN YEARS OF AGE OR OLDER, AND YOU MUST BE ABLE TO READ, WRITE AND SPEAK THE ENGLISH LANGUAGE. YOU MUST NOT BE INCAPABLE OF SERVING AS A JUROR BECAUSE OF A MENTAL OR PHYSICAL INFIRMITY. NOW, LET ME EXPLAIN THOSE TO YOU. BY MENTAL INFIRMITY WE COULD MEAN, FOR EXAMPLE, THAT YOU HAVE A NERVOUS CONDITION, THAT IF YOU WERE SITTING IN THE JURY BOX, YOU COULDN'T GIVE THIS CASE YOUR UNDIVIDED ATTENTION. A PHYSICAL INFIRMITY COULD BE ONE WHERE YOU HAVE A HEARING PROBLEM. IF YOU CAN'T HEAR ALL THE EVIDENCE, IT LOGICALLY FOLLOWS THAT YOU WOULD NOT BE ABLE TO RENDER A FAIR DECISION. AND THE LAST THING, YOU MUST NOT HAVE A CHARGE PENDING AGAINST YOU, OR HAVE BEEN CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR, AND YOUR CIVIL RIGHTS HAVE NOT BE RESTORED. NOW, THOSE ARE THE STATUTORY QUALIFICATIONS. DO ANY OF YOU LACK ANY ONE OR MORE OF THESE QUALIFICATIONS? IF YOU DO, PLEASE RAISE YOUR HAND. SEEING NO HANDS, I WILL ASSUME THAT YOU ARE ALL QUALIFIED AT THIS POINT. NOW, MR. CHADDICK, WOULD YOU NOW DRAW EIGHTEEN NAMES,

PLEASE. AND, MR. ALEXANDER, STARTING PUTTING THEM ON THE BACK ROW SEATS. FILL UP THE BACK AND FRONT, AND WE WILL PUT THE REST ON THE SEATS INSIDE THE RAIL.

THE MARSHAL: AS I CALL YOUR NAME, COME FORWARD AND HAVE A SEAT. NUMBER 41, RODNEY GASPARD. NUMBER 2, RON BRADLEY. NUMBER SIXTEEN, ARA ELOI.

MS. ELOI: ELOI.

THE COURT: HOW IS THAT SPELLED, MA'AM?

MS. ELOI: E-L-O-I.

THE COURT: AND IT IS PRONOUNCED HOW?

MS. ELOI: ELOI.

THE COURT: ELOI. ALL RIGHT. THANK YOU, MA'AM.

THE MARSHAL: NUMBER TWENTY, GLADYS HANSBROUGH. NUMBER THREE, WILLIE COMBS. NUMBER TWELVE, WILTON SIMMONS. NUMBER FIFTEEN, ROBERT DOUGHERTY. NUMBER TWENTY-EIGHT, LAWRENCE PANIUSKI. NUMBER TWENTY-THREE, NIKKI FRUGE. NUMBER TWENTY-SEVEN, CHARLES WILLIAMS. NUMBER THIRTY-SEVEN, ELOISE MCBRIDE. NUMBER SIX, PHILLIP SOILEAU. NUMBER FIVE, WAVELLE DUGAS. NUMBER NINE, ROBERTA YELLOTT. NUMBER EIGHTEEN, RAY SMITH. NUMBER FORTY-THREE, JAMES ALBARADO. NUMBER TWENTY-NINE, JOHN WHITE. NUMBER THIRTY-TWO, JOHN ASKEW. THAT'S EIGHTEEN, YOUR HONOR.

THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, THE CASE YOU WILL BE HEARING IS THE CASE OF THADDEUS DONALD EDMONSON VERSUS LEESVILLE CONCRETE COMPANY, INCORPORATED.

AND BY THE WAY, LET ME EXPLAIN TO YOU, BECAUSE I HAVE FOUND OUT THAT SOME PEOPLE DON'T UNDERSTAND WHO THE PLAINTIFF AND WHO THE DEFENDANTS ARE. SO I AM GOING TO TELL YOU. THE PLAINTIFF IS THE PERSON BRINGING THE LAWSUIT. SO MR. EDMONSON IS THE PLAINTIFF. NOW, MR. EDMONSON, WOULD YOU STAND AND FACE THE JURY, PLEASE? ALL RIGHT. THANK YOU, SIR. YOU MAY BE SEATED. MR. EDMONSON HAS ALLEGED THAT ON OR ABOUT JUNE 18, 1984, THAT WHILE INVOLVED WITH A CONCRETE TRUCK THAT HAD BEEN COMPLETED UNLOADING, HE WAS INJURED AS A RESULT OF THE CONCRETE TRUCK ROLLING BACKWARDS. AND AS A RESULT OF IT, HE IS CONTENDING THAT HE HAS SUFFERED THE INJURIES WHICH IS THE SUBJECT OF THIS LAWSUIT. NOW, AT THIS TIME I WILL ASK, DO ANY OF YOU KNOW MR. THADDEUS DONALD EDMONSON, THE PLAINTIFF IN THIS CASE? NOW, REPRESENTING MR. EDMONSON IS MR. JAMES DOYLE. WOULD YOU STAND, PLEASE?

MR. DOYLE: YES, SIR.

THE COURT: ALSO REPRESENTING MR. EDMONSON IS MR. JOE MORGAN, JR. NOW, FIRST OF ALL, I ASK DO ANY OF YOU KNOW MR. JAMES DOYLE? ALL RIGHT, MRS. YELLOTT.

JUROR YELLOTT: YES, SIR.

THE COURT: HOW DO YOU KNOW HIM?

JUROR YELLOTT: HE ATTENDED OUR CHURCH FOR SOMETIME.

THE COURT: ALL RIGHT. WOULD YOU BE SEATED, GENTLEMEN. HE ATTENDED YOUR CHURCH FOR SOMETIME?

JUROR YELLOTT: YES, SIR.

THE COURT: DOES HE STILL ATTEND YOUR CHURCH?

JUROR YELLOTT: I DON'T THINK SO. I HAVEN'T SEEN HIM IN A WHILE.

THE COURT: ALL RIGHT. WELL, MAYBE HE IS GOING TO ANOTHER ONE, AND THAT IS PROBABLY WHY YOU ARE NOT SEEING HIM. HE MAY BE GOING TO THE SAME DENOMINATION, BUT A DIFFERENT CHURCH. BUT WHAT WE ARE CONCERNED WITH, AND I WANT ALL OF THE JURORS TO UNDERSTAND THAT WHAT THE COURT IS LOOKING FOR, AND WHAT THE ATTORNEYS AND PARTIES ARE LOOKING FOR, IS A JURY THAT WILL LISTEN TO THE EVIDENCE, DETERMINE THE FACTS FROM THE EVIDENCE AND RENDER A FAIR AND IMPARTIAL DECISION. AND THAT IS THE PURPOSE OF THESE QUESTIONS, TO FIND OUT IF THERE IS SOMETHING THAT WOULD LEAD US TO BELIEVE, OR THEM TO BELIEVE THAT MAYBE SOMETHING WOULD HAPPEN. NOW, DID YOU SOCIALIZE WITH MR. DOYLE AND HIS FAMILY, MA'AM?

JUROR YELLOTT: NO, SIR.

THE COURT: ALL RIGHT. WELL, I AM JUST GOING TO GO STRAIGHT TO THE DIRECT QUESTION. WOULD THE FACT THAT HE ATTENDED THE SAME CHURCH YOU ATTENDED, WOULD THAT, IN ANYWAY, INFLUENCE YOUR DECISION IN THIS CASE?

JUROR YELLOTT: NO.

THE COURT: SEE, WHAT I AM THINKING ABOUT NOW IS THAT IF YOU ARE SELECTED AND SWORN AS A JUROR, AND YOU GET IN THE JURY LOUNGE AREA, INSTEAD OF DISCUSSING THE EVIDENCE, IN

THE BACK OF YOUR MIND, YOU SAY, WELL, YOU KNOW, MR. DOYLE WENT TO MY CHURCH. HE IS A REAL NICE FELLOW. AND BY THE WAY, HE IS. I WOULDN'T WANT THAT TO INFLUENCE YOUR DECISION, IN ANYWAY. ON THE OTHER HAND, FROM THE FACT THAT HE ATTENDED YOUR CHURCH, MAYBE YOU CONCLUDED MAYBE HE IS NOT SUCH A NICE FELLOW, AND ON THE OTHER HAND, I WOULDN'T WANT YOU TO CONCLUDE, WELL, I DON'T LIKE HIM, THEREFORE I AM NOT GOING TO BE FAIR TO THE PLAINTIFF. DO YOU UNDERSTAND MY QUESTION? AND CAN YOU TELL THIS COURT, UNDER OATH, THAT IF YOU ARE SELECTED AND SWORN AS A JUROR, YOU CAN RENDER A FAIR AND IMPARTIAL DECISION?

JUROR YELLOTT: YES, SIR.

THE COURT: ANYONE ELSE KNOW MR. DOYLE? HOW ABOUT MR. MORGAN? THANK YOU, MR. MORGAN. ALL RIGHT. NOW, MR. DOYLE, I AM GOING TO JUST ASK YOU TO NAME OFF, OR READ OFF THE LIST OF YOUR PARTNERS AND ASSOCIATES, AND ASK THE JURORS TO LISTEN TO THOSE NAMES.

MR. DOYLE: YES, SIR.

THE COURT: AND THEN I WANT TO ASK YOU IF YOU KNOW ANY OF THEM.

MR. DOYLE: JUDGE, MY PARTNERS ARE EDMOND E. WOODLEY, EDGAR F. BARNETT, JAMES E. WILLIAMS, ROBERT W. FENET, PAUL E. PALMER, EARL G. PITRE, OR PITRE, SOME PEOPLE CALL HIM PITRE, CLAYTON A. L. DAVIS, RICK J. NORMAN, AND OUR ASSOCIATES ARE HENRY E. YOES, KNOWN AS GENE YOES, KATHLEEN

KAY AND MR. MORGAN HERE.

THE COURT: DO ANY OF YOU KNOW ANY OF THESE OTHER NAMES? ALL RIGHT. AGAIN, MS. YELLOTT.

JUROR YELLOTT: MR. FENET. HIS CHILDREN AND MY CHILDREN GO TO SCHOOL TOGETHER, AND ARE GOOD FRIENDS.

THE COURT: ALL RIGHT. WOULD THE FACT, WOULD THAT FACT INFLUENCE YOU, IN ANYWAY?

JUROR YELLOTT: NO.

THE COURT: OR WOULD YOU DO WHAT I SAID YOU SHOULD DO?

JUROR YELLOTT: WOULD DO WHAT I SHOULD DO? YES, SIR.

THE COURT: IN OTHER WORDS, SIMPLY DISCUSS THE EVIDENCE AND DETERMINE THE FACTS FROM THE EVIDENCE AND TAKE THE LAW AS I GIVE IT TO YOU AND RENDER A VERDICT?

JUROR YELLOTT: YES, SIR.

THE COURT: ALL RIGHT. LET'S SEE. MR. ASKEW.

JUROR ASKEW: YES, SIR. I KNOW MR. FENET FAIRLY WELL, SOCIALLY, HE AND HIS FAMILY.

THE COURT: WELL, THE FACT THAT YOU KNOW MR. FENET SOCIALLY, WOULD THAT INFLUENCE YOUR DECISION IN THIS CASE?

JUROR ASKEW: NO, SIR.

THE COURT: IF IT WOULD, TELL US NOW.

JUROR ASKEW: NO, SIR, IT WON'T.

THE COURT: ALL RIGHT. I BELIEVE YOU, SIR. ANYONE ELSE KNOW ANY OF THESE GENTLEMEN. ALL RIGHT. ALL RIGHT, MR. GASPARD.

JUROR GASPARD: WOODLEY, ED WOODLEY.

THE COURT: YOU KNOW MR. WOODLEY?

JUROR GASPARD: YES, SIR.

THE COURT: I AM SURE YOU HAVE RUN ACROSS HIM SOCIALLY.

JUROR GASPARD: YES. AND FENET.

THE COURT: YES. WOULD THE FACT THAT YOU HAVE RUN ACROSS THEM SOCIALLY, WOULD THAT INFLUENCE YOU, IN ANYWAY?

JUROR GASPARD: NO.

THE COURT: THANK YOU. THE REASON WHY WE ARE ASKING THESE QUESTIONS IS BECAUSE AFTER THE CASE IS OVER, IF YOU RAN ACROSS ONE OF THE ATTORNEYS--

(NOTE: AT WHICH POINT FIRE ALARM SOUNDED.)

THE COURT: ALL RIGHT. BACK ON THE RECORD, MR. WILLIAMS, NOW. ALL RIGHT. NOW, AS I WAS TELLING YOU, LADIES AND GENTLEMEN, THE PURPOSE OF THESE QUESTIONS IS THAT, FOR EXAMPLE, AFTER THE CASE IS OVER, IF YOU HAPPEN TO MEET WITH ONE OF THESE LAWYERS, WOULD YOU BE EMBARRASSED BECAUSE OF RUNNING INTO THEM BECAUSE OF YOUR VERDICT. THAT IS WHAT WE ARE REALLY AFTER. SO IF IT WOULD CREATE A SITUATION WHERE YOU WOULD BE EMBARRASSED IN RUNNING ACROSS, FOR EXAMPLE, MR.

GASPARD, IF YOU RAN ACROSS MR. FENET OR MR. WOODLEY LATER ON, WOULD YOU FEEL LIKE, WELL, YOU KNOW, HIS LAW FIRM REPRESENTED THAT FELLOW, AND I AM KIND OF EMBARRASSED ABOUT IT. THAT IS WHAT WE ARE TALKING ABOUT. AND I KNOW YOU ARE TELLING ME THAT THAT WON'T AFFECT YOU. ALL RIGHT. NOW, REPRESENTING THE DEFENDANT IN THIS CASE, LEESVILLE CONCRETE COMPANY, IS MR. JOHN HONEYCUTT. AND LET ME ASK THIS, LADIES AND GENTLEMEN. DO ANY OF YOU KNOW MR. HONFYCUTT? ALL RIGHT. MR. HONEYCUTT, WOULD YOU NAME OFF YOUR PARTNERS AND ASSOCIATES, SIR?

MR. HONEYCUTT: MY PARTNERS ARE MR. J. MICHAEL PERCY, MR. DAVID P. SMITH, MS. ELIZABETH E. FOOTE AND, OF COURSE, MYSELF. OUR ASSOCIATES ARE STEVEN GRAALMAN AND GARY NUNN AND ARRON MORIARTY.

THE COURT: ALL RIGHT. DO ANY OF YOU KNOW ANY OF THOSE PEOPLE THAT HE HAS MENTIONED? NOW, THE YOUNG LADY SITTING THERE, WHO IS SHE?

MR. HONEYCUTT: THIS IS SANDRA SMITH. SHE IS A PARALEGAL WITH OUR FIRM.

THE COURT: ALL RIGHT.

MR. HONEYCUTT: I MIGHT ADD, JUDGE, THAT OUR FIRM IS LOCATED IN ALEXANDRIA.

THE COURT: ALL RIGHT. FINE. NOW, THAT WE HAVE EXPLAINED WHAT THE CASE IS ABOUT, AND THE PARTIES INVOLVED, LET ME ASK YOU A FEW MORE QUESTIONS. HAVE ANY OF YOU EVER

SERVED ON A JURY BEFORE? OKAY. START WITH MR. GASPARD. WAS IT CIVIL OR CRIMINAL? DO YOU RECALL?

JUROR GASPARD: CIVIL.

THE COURT: AND WHERE WAS IT, STATE OR FEDERAL COURT?

JUROR GASPARD: I WOULD SAY STATE.

THE COURT: YEAH. DOWN THE STREET?

JUROR GASPARD: YEAH.

THE COURT: AND DO YOU REMEMBER HOW IT CAME OUT? IF YOU DO, IT IS FINE; IF YOU DON'T, FINE.

JUROR GASPARD: IT'S BEEN A LONG TIME AGO.

THE COURT: ALL RIGHT. MR. BRADLEY?

JUROR BRADLEY: YES, SIR. CIVIL.

THE COURT: AND WHERE, SIR?

JUROR BRADLEY: IT WAS HERE, FEDERAL.

THE COURT: DO YOU REMEMBER HOW IT CAME OUT?

JUROR BRADLEY: A LITTLE BIT.

THE COURT: DID THE JURY BRING A VERDICT FOR THE PLAINTIFF OR THE DEFENDANT, OR DO YOU RECALL?

JUROR BRADLEY: PLAINTIFF.

THE COURT: OKAY. MS. ELOI, DID YOU RAISE YOUR HAND?

JUROR ELOI: NO.

THE COURT: ALL RIGHT. WHO ELSE ON THE BACK ROW? ALL RIGHT. LET'S GET TO THE FRONT ROW THEN. ALL

RIGHT, MR. PANIUSKI?

JUROR PANIUSKI: YOUR HONOR, I DON'T REMEMBER. IT WAS A FEW MONTHS AGO HERE IN FEDERAL.

THE COURT: WAS IT ME OR JUDGE HUNTER?

JUROR PANIUSKI: IT WAS YOU.

THE COURT: WHAT KIND OF CASE WAS IT? DO YOU REMEMBER?

JUROR PANIUSKI: ASSAULT AND BATTERY, I BELIEVE IT WAS. WE HAD A CIVIL CASE. IT WAS THE COUSHATTA RESERVATION.

THE COURT: OH, YES. THAT WAS A CRIMINAL CASE.

JUROR PANIUSKI: CRIMINAL, YEAH. WITH A WEAPON.

THE COURT: AND YOU ALL FOUND HIM WHAT? GUILTY?

JUROR PANIUSKI: GUILTY.

THE COURT: THAT'S RIGHT. I REMEMBER NOW. ALL RIGHT. LET'S SEE. MR. WILLIAMS, DID YOU RAISE YOUR HAND? I MEAN MS. MCBRIDE, YOU RAISED YOUR HAND?

JUROR MCBRIDE: YES. HERE, LAST YEAR. BUT IT WAS SETTLED OUT OF COURT. WE WERE DISMISSED.

THE COURT: SO YOU DIDN'T GET TO RENDER A VERDICT?

JUROR MCBRIDE: RIGHT.

THE COURT: MR. SOILEAU?

JUROR SOILEAU: I HAVE BEEN ON FOUR JURIES.

THE COURT: ALL RIGHT.

JUROR SOILEAU: CRIMINAL AND CIVIL. BUT ONLY ONE

WENT TO, WE ACTUALLY DELIBERATED. AND THAT WAS A CRIMINAL. AND WE ENDED UP IN A HUNG JURY.

THE COURT: ALL RIGHT.

JUROR SOILEAU: SO I HAVEN'T SETTLED ANYBODY ANYTHING.

THE COURT: WHAT KIND OF CASE WAS IT?

JUROR SOILEAU: ONE WAS--

THE COURT: NO. THE ONE YOU HUNG UP.

JUROR SOILEAU: WE DELIBERATED, WAS ON A DRUG CASE, UNDERCOVER WORK.

THE COURT: OKAY. ANYBODY ELSE ON THE FRONT ROW? ALL RIGHT, MR. DUGAS?

JUROR DUGAS: IT WAS A CIVIL CASE. AND IT ENDED FOR THE DEFENDANT.

THE COURT: WAS IT HERE OR IN STATE COURT?

JUROR DUGAS: HERE IN DISTRICT.

THE COURT: HOW LONG AGO? DO YOU REMEMBER?

JUROR DUGAS: ABOUT FOUR YEARS AGO.

THE COURT: ALL RIGHT, MS. YELLOTT?

JUROR YELLOTT: IT WAS A CRIMINAL CASE LAST SUMMER, THE SAME JURY THAT THE FIRST GENTLEMAN SERVED ON, THE INDIAN.

THE COURT: YOU WERE HERE THEN? YOU KNOW, IT IS AMAZING, I HAVE GOT TO TELL YOU THIS. I RUN INTO PEOPLE WHO SAY, OH, JUDGE, I WOULD LIKE TO SERVE ON THE JURY IN FEDERAL COURT. I SAY I DON'T HAVE ANYTHING TO DO WITH IT. IT IS ALL

COMPUTER. AND THEN I HAVE GOT PEOPLE THAT THEY CALL TWO AND THREE TIMES, AND SAY I DON'T WANT TO SERVE. AND I SAY I DON'T HAVE ANYTHING TO DO WITH IT. IT'S PICKED BY RANDOM. ALL RIGHT. ON THE BACK ROW. ALL RIGHT, MR. ALBARADO?

JUROR ALBARADO: YES, SIR. I SERVED ON A CIVIL CASE IN CAMERON WITH JUDGE WARD FONTENOT.

THE COURT: YES, SIR.

JUROR ALBARADO: IT WAS AN ATTEMPTED RAPE CASE. AND REALLY WASN'T VERY SOLID EVIDENCE OR ANYTHING. AND WE JUST WENT THROUGH THE MOTIONS, AND HAD A HUNG JURY. AND I DON'T THINK IT'S EVER COME UP AGAIN.

THE COURT: ALL RIGHT. AND MR. ASKEW.

JUROR ASKEW: YES, SIR. I SERVED ON SPECIAL COURT MARTIAL BOARD WHEN I WAS IN THE MILITARY.

THE COURT: ALL RIGHT. FINE. NOW, LADIES AND GENTLEMEN, THE NEXT QUESTION I AM GOING TO ASK YOU, BUT BEFORE I ASK IT, I WANT TO TELL YOU, IF YOUR ANSWER IS YES, YOU HAVE NOT DONE ANYTHING WRONG. THE QUESTION IS, HAS ANYONE ATTEMPTED TO CONTACT YOU, OR ANY MEMBER OF YOUR IMMEDIATE FAMILY CONCERNING THIS CASE. NOW, YOU SEE WHY I SAID IF THAT HAS HAPPENED, YOU DID NOT DO ANYTHING WRONG. BUT IT IS ESSENTIAL THAT WE KNOW. SO I TAKE IT NOBODY HAS BEEN ATTEMPTED TO BE CONTACTED BY ANYONE. ALL RIGHT. NOW, I AM GOING TO TALK ABOUT YOU AND MEMBERS OF YOUR IMMEDIATE FAMILY. SO I WILL DEFINE IMMEDIATE FAMILY. THAT IS YOUR

PARENTS, YOUR SPOUSE, YOUR CHILDREN AND YOUR BROTHERS AND SISTERS. NOW, HAVE ANY OF YOU OR ANY MEMBER OF YOUR IMMEDIATE FAMILY EVER FILED A LAWSUIT OR CLAIM AS A RESULT OF AN ACCIDENT? IF YOU HAVE, PLEASE RAISE YOUR HAND. AIL RIGHT. NO ONE HAS.

JUROR PANIUSKI: WHAT DO YOU MEAN, AN ACCIDENT? WELL, I WOULD SAY IT HAPPENED, I DON'T REMEMBER, IT'S BEEN EIGHT, MAYBE TEN YEARS AGO, I GUESS I WOULD SAY ROUGHLY SOMEWHERE IN THERE, WHERE MY DAUGHTER HAD WORKED FOR PIZZA HUT, AND WHAT THEY DID WAS PUT A CO2 TANK IN THE TRUNK OF MY AUTOMOBILE. AND WHAT HAPPENED, WHEN SHE TURNED OFF OF RYAN TO COME DOWN PRIEN LAKE TO DELIVER OVER ON HIGHWAY 14, AND WHEN SHE TURNED, THE TANK WASN'T SECURED. SO IN OTHER WORDS, WHAT HAPPENED, IT ROLLED. AND WHEN IT HIT THE CORNER OF THE TRUNK, IT POPPED THE VALVE AND ACCIDENTLY TOOK AND PUT HER TO SLEEP. AND SHE HIT THE, WHICH IS COMMUNITY COFFEE PLACE, OVER THERE ON PRIEN LAKE ROAD THERE. THE CASE THAT WAS FILED.

THE COURT: DID SHE FILE A SUIT OR CLAIM AS A RESULT OF THAT?

JUROR PANIUSKI: WELL, SHE FILED A SUIT WHICH WAS SETTLED, I BELIEVE.

THE COURT: YES.

JUROR PANIUSKI: WAS SETTLED OUT OF COURT.

THE COURT: THAT IS WHAT I AM ASKING.

JUROR PANIUSKI: YEAH.

THE COURT: IN OTHER WORDS, SHE DID FILE A SUIT OR CLAIM AS A RESULT OF AN ACCIDENT?

JUROR PANIUSKI: YEAH.

THE COURT: ALL RIGHT. OKAY. MR. WHITE?

JUROR WHITE: MY DAD FILED SUIT BECAUSE OF AN ACCIDENT GOING TO LAFAYETTE. IT HAS BEEN MAYBE A YEAR AGO, A YEAR OR SO AGO, BECAUSE OF AN ACCIDENT.

THE COURT: AND SUIT WAS FILED WHERE? IN LAFAYETTE?

JUROR WHITE: NO, SIR. I BELIEVE IT'S FILED EITHER IN LAFAYETTE OR BATON ROUGE.

THE COURT: HAS IT BEEN RESOLVED YET?

JUROR WHITE: YES, SIR.

THE COURT: ALL RIGHT. THE FACT THAT YOUR DADDY WAS INVOLVED IN A SUIT, AND THIS IS ALSO FOR YOU, MR. PANIUSKI, WOULD THAT, IN ANYWAY, INFLUENCE YOUR DECISION IN THIS CASE?

JUROR PANIUSKI: NO, SIR.

JUROR WHITE: NO, SIR, YOUR HONOR.

THE COURT: ANYONE ELSE? NOW, WE ARE GOING TO JUST FLIP THE COIN OVER ON THE OTHER SIDE. HAVE ANY OF YOU OR ANY MEMBERS OF YOUR IMMEDIATE FAMILY EVER HAVE A SUIT OR CLAIM FILED AGAINST YOU? ALL RIGHT, MR. WILLIAMS. LET'S SEE AM I GETTING THIS RIGHT?

JUROR WILLIAMS: YES, SIR.

THE COURT: ALL RIGHT. YOU ARE MR. WILLIAMS. WHAT WAS IT ABOUT, SIR?

JUROR WILLIAMS: I HAVE A SUIT PENDING NOW AGAINST ME. I AM A CONTRACTOR. A MAN WORKED FOR ANOTHER MAN ON A PROJECT I HAD FINISHED, IS SUING ME FOR EIGHT HUNDRED AND FIFTY THOUSAND DOLLARS.

THE COURT: GIVE ME THAT AGAIN, NOW, SO I UNDERSTAND. YOU ARE A CONTRACTOR?

JUROR WILLIAMS: YES, SIR. I AM A GENERAL CONTRACTOR.

THE COURT: ALL RIGHT. AND A MAN WORKING FOR YOU--

JUROR WILLIAMS: NO. THIS MAN NEVER WORKED FOR ME, PERIOD. HE WAS WORKING FOR A CONTRACTOR THAT WAS PICKING UP SALVAGE TIMBER ON A ROAD RIGHT OF WAY THAT I HAD CLEARED AND BUILT PREVIOUSLY.

THE COURT: UH-HUH.

JUROR WILLIAMS: AND HE CLAIMED TO HAVE A BACK INJURY. SO HE HAS A LAWSUIT PENDING AGAINST ME, AGAINST MY COMPANY NOW.

THE COURT: AND SUED BECAUSE ALLEGEDLY YOUR COMPANY ALLEGEDLY DID SOMETHING WRONG?

JUROR WILLIAMS: YES, SIR.

THE COURT: ALL RIGHT. AND THAT SUIT IS STILL

PENDING?

JUROR WILLIAMS: YES, SIR.

THE COURT: ALL RIGHT. THE FACT THAT THAT HAS OCCURRED, WOULD THAT, IN ANYWAY, INFLUENCE YOUR DECISION IN THIS CASE?

JUROR WILLIAMS: NO, SIR.

THE COURT: WELL, IF IT WOULD, PLEASE TELL US. I WANT TO KNOW WHETHER IT CONSCIOUSLY OR SUBCONSCIOUSLY, IF YOU FEEL IT WOULD INFLUENCE YOU.

JUROR WILLIAMS: I DON'T BELIEVE IT WOULD, SIR.

THE COURT: IN OTHER WORDS, WHAT I WANT TO MAKE SURE, MR. WILLIAMS, IS THAT IF YOU SIT AS A JUROR IN THIS CASE, AND YOU GO INTO THE JURY ROOM, THAT YOU ARE NOT THINKING OF THE CIRCUMSTANCES OF YOUR CASE, AND THAT YOU ARE ACTUALLY JUST SIMPLY THINKING ABOUT WHAT WAS THE EVIDENCE PRESENTED, THE LAW AS I GIVE IT TO YOU, AND RENDER A DECISION WITHOUT ANY THOUGHT WHATSOEVER TO MR. EDMONSON OR LEESVILLE CONCRETE COMPANY. AND CAN YOU DO THAT?

JUROR WILLIAMS: YES.

THE COURT: ALL RIGHT. NOW, MS. FRUGE?

JUROR FRUGE: MY FATHER-IN-LAW, I BELIEVE, CAME TO COURT WITH A SUIT. HIS DOG BIT A LITTLE GIRL THAT WAS IN THE YARD. AND I BELIEVE THEY FILED SUIT. BUT I REALLY DON'T KNOW ANY OF THE DETAILS ABOUT IT. I DON'T THINK IT WOULD MAKE ANY DIFFERENCE.

THE COURT: WELL, LET ME MAKE SURE. I WANT YOU TO TELL ME IT WILL NOT MAKE ANY DIFFERENCE.

JUROR FRUGE: NO. IT WILL NOT. I DON'T KNOW ANY OF THE DETAILS.

THE COURT: ALL RIGHT. ANYONE ELSE? MR. GASPARD?

JUROR GASPARD: I HAVE AN INSURANCE COMPANY THAT HAS GOT A SUIT AGAINST OUR COMPANY, INVOLVING A SALVAGE CONTRACT.

THE COURT: IT IS A SUIT ON A CONTRACT?

JUROR GASPARD: YES.

THE COURT: WOULD THAT, MR. GASPARD, INFLUENCE YOU IN THIS CASE?

JUROR GASPARD: NO.

THE COURT: FINE. ANYONE ELSE? DO ANY OF YOU HAVE ANY BIASES OR PREJUDICES AGAINST ANYONE WHO BRINGS, WHO FILES A SUIT TO RECOVER FOR DAMAGES FOR INJURIES ALLEGEDLY INCURRED IN AN ACCIDENT? ALL RIGHT, MR. WHITE.

JUROR WHITE: YOUR HONOR, A COUPLE OF YEARS BACK, I DON'T KNOW IF THIS WOULD HAVE ANY INFLUENCE ON MY DECISION, BUT A COUPLE OF YEARS BACK, MY BROTHER'S WIFE WAS ROBBED AND RAPED IN PLAQUEMINES, LOUISIANA, A COUPLE OF YEARS BACK.

THE COURT: WELL, MY QUESTION IS, DO YOU HAVE ANY BIASES OR PREJUDICES AGAINST PEOPLE WHO FILE A SUIT TO RECOVER FOR THE INJURIES THEY ALLEGEDLY INCURRED IN AN

ACCIDENT. WOULD YOU HOLD THAT AGAINST THEM BECAUSE THEY FILED A SUIT TO RECOVER FOR INJURIES THEY THINK WAS CAUSED BY SOMEONE ELSE?

JUROR WHITE: WELL, MY BROTHER, YOU KNOW, HE WENT THROUGH A WHOLE BUNCH OF STUFF SINCE THIS. AND, NATURALLY, THAT HAS SOME INFLUENCE, YOU KNOW, ON THE WAY I THINK.

THE COURT: YEAH. BUT YOU SEE, YOU ARE TALKING ABOUT A CRIMINAL SITUATION.

JUROR WHITE: YEAH.

THE COURT: WE ARE NOT TALKING ABOUT A CRIMINAL SITUATION HERE, MR. WHITE. BUT I DON'T WANT TO PUT WORDS IN YOUR MOUTH BECAUSE I WANT YOU TO BE HONEST WITH US. BECAUSE ALL THE ATTORNEYS WANT TO MAKE SURE YOU FULLY UNDERSTAND AND CAN BE A FAIR AND IMPARTIAL JUROR. AND AGAIN, THE QUESTION IS SIMPLY THAT IF SOMEBODY IS INJURED IN AN ACCIDENT, DO YOU HOLD IT AGAINST THEM IF THEY BROUGHT SUIT AGAINST THE PARTY ALLEGEDLY CAUSING THE ACCIDENT, TO RECOVER FOR THEIR INJURY?

JUROR WHITE: NO.

THE COURT: CAN YOU DO THAT IN THIS CASE?

JUROR WHITE: YES, SIR.

THE COURT: IN OTHER WORDS, IF MR. EDMONSON PROVES THAT HE WAS INJURED AS A RESULT OF THE ACTIONS OF THE DEFENDANT, WOULD YOU RENDER A VERDICT IN HIS FAVOR AND AWARD HIM DAMAGES THAT YOU FIND HE IS ENTITLED TO?

JUROR WHITE: YES, SIR.

THE COURT: AND IT WOULD NOT INFLUENCE YOUR DECISION IN ANY OTHER WAY?

JUROR WHITE: NO.

THE COURT: ANYONE ELSE? ALL RIGHT. NOW, LADIES AND GENTLEMEN, I AM GOING TO ASK THAT YOU STAND INDIVIDUALLY, AND I WILL TELL YOU NOW WHAT IT IS, BUT I WILL PROMPT YOU IN CASE YOU FORGET. I WANT YOUR NAME, YOUR ADDRESS, YOUR AGE, YOUR OCCUPATION, YOUR SPOUSE'S OCCUPATION AND THE NUMBER OF CHILDREN. I DO NOT WANT THE NAMES OR AGES OF YOUR CHILDREN. I KNOW YOU ARE PROUD OF THEM, BUT I JUST WANT TO KNOW HOW MANY. THE OTHER THING, THE LADIES ARE PERMITTED, IF THEY WISH, TO SIMPLY SAY I AM OVER EIGHTEEN. SO FOR AN EXAMPLE, MS. FRUGE, IF YOU DON'T WANT TO TELL US HOW OLD YOU ARE, THAT IS ALL RIGHT. YOU CAN SAY I AM OVER EIGHTEEN. ON THE OTHER HAND, MR. GASPARD, YOU ARE GOING TO HAVE TO TELL US.

JUROR GASPARD: I HAVE GOT TO DO IT WHETHER I WANT TO OR NOT?

THE COURT: ALL RIGHT. WOULD YOU START, MR. GASPARD, PLEASE?

JUROR GASPARD: I AM FIFTY. MY NAME IS ROD GASPARD. WE OWN AGCO AUTO PARTS, AUTO PARTS SALVAGE BUSINESS.

THE COURT: THAT IS A GOOD IDEA. YOU MIGHT HAVE A CUSTOMER HERE.

JUROR GASPARD: YEAH. I WAS THINKING ABOUT THAT ALL THE TIME.

THE COURT: SURELY.

JUROR GASPARD: OUR BUSINESS IS LOCATED AT 4401 SOUTH LINCOLN ROAD, LAKE CHARLES. MY WIFE WORKS IN THE BUSINESS. I THINK SHE PROBABLY RUNS THE THING. WE HAVE TWO CHILDREN.

THE COURT: AND YOU SAID YOU ARE FIFTY?

JUROR GASPARD: I AM FIVE-O, RIGHT.

THE COURT: AND WHERE DO YOU LIVE?

JUROR GASPARD: WE LIVE AT BIG LAKE RIGHT NOW.

THE COURT: ALL RIGHT. GOOD. THANK YOU. MR. BRADLEY?

JUROR BRADLEY: RON BRADLEY. I LIVE IN DERIDDER, TWENTY-FIVE YEARS OLD. I AM NOT MARRIED. I DON'T HAVE NO KIDS. I WORK FOR BROCK CONSTRUCTION OUT OF DERIDDER, LOUISIANA.

THE COURT: YOU DO WHAT, SIR?

JUROR BRADLEY: I WORK FOR BROCK CONSTRUCTION. I AM A BUCKET TRUCK OPERATOR.

THE COURT: BROCK CONSTRUCTION COMPANY, DOING WHAT, SIR?

JUROR BRADLEY: RUNNING A BUCKET TRUCK, BUCKET TRUCK OPERATOR.

THE COURT: A BUCKET TRUCK OPERATOR?

JUROR BRADLEY: YOU KNOW, LIKE A HIGH LINE.

THE COURT: ALL RIGHT.

JUROR BRADLEY: I RUN ONE OF THEM.

THE COURT: ALL RIGHT, SIR. THANK YOU VERY MUCH.

JUROR ELOI: MY NAME IS ARA ELOI. I LIVE AT 217 LELAND STREET IN SULPHUR. MY HUSBAND IS A MACHINIST. AND WE OWN A SMALL COMPANY, ELOI ENTERPRISES. AND I HAVE THREE CHILDREN. AND I AM SIXTY-THREE YEARS OLD.

THE COURT: AND YOUR HUSBAND, WHAT KIND OF BUSINESS IS IT, MA'AM?

JUROR ELOI: IT'S A TRAILER PARK. AND HE HAS A RENT HOUSE OR TWO, AND FIFTEEN LARGE TRAILER SPACES, AND THEN TRAVEL TRAILER SPACES.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

JUROR ELOI: IT'S A SMALL CORPORATION.

THE COURT: ALL RIGHT. MS. HANSBROUGH.

JUROR HANSBROUGH: I AM GLADYS HANSBROUGH. I LIVE IN DEQUINCY, LOUISIANA. I HAVE FOUR CHILDREN, FOUR GIRLS. ONE A PARALEGAL AID LAWYER. ONE DRIVES FOR GREYHOUND, AND THE OTHER ONE IS A TEACHER. THEY ARE IN DETROIT. MY BABY GIRL IS, SHE LIVES HERE IN DEQUINCY. SHE IS A NURSE'S AID. I AM A RETIRED NURSE AND--

THE COURT: HOW ABOUT YOUR HUSBAND?

JUROR HANSBROUGH: I AM A WIDOW.

THE COURT: HOW LONG HAVE YOU BEEN A WIDOW?

JUROR HANSBROUGH: SEVEN YEARS.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH. MR. COMBS.

JUROR COMBS: MY NAME IS WILLIE COMBS. I LIVE AT 1010 8TH AVENUE. I AM A LAB TECHNICIAN AT HIMONT, INCORPORATED. I HAVE TWO CHILDREN. MY WIFE WORKS IN THE HOME.

THE COURT: ALL RIGHT. THANK YOU. MR. SIMMONS.

JUROR SIMMONS: MY NAME IS WILTON SIMMONS. I LIVE IN KINDER, LOUISIANA. MARRIED. I HAVE FOUR CHILDREN, GROWN. AND I AM RETIRED.

THE COURT: WHAT DID YOU DO BEFORE YOU RETIRED?

JUROR SIMMONS: WORKED IN A CLEANERS.

THE COURT: I DIDN'T HEAR YOU, SIR.

JUROR SIMMONS: WORKED IN A CLEANERS, MANAGER OF IT.

THE COURT: ALL RIGHT. AND YOUR WIFE IS A HOUSEWIFE?

JUROR SIMMONS: HOUSE MAID.

THE COURT: THANK YOU, SIR. MR. DOUGHERTY.

JUROR DOUGHERTY: MY NAME IS ROBERT DOUGHERTY. I RESIDE AT ROUTE 1, BOX 170, ROANOKE. PERSONNEL SERVICES OFFICERS FOR JEFF DAVIS VO-TECH SCHOOL IN JENNINGS. MY WIFE IS A FIRST GRADE TEACHER IN JENNINGS. I HAVE TWO CHILDREN, A

DAUGHTER TWENTY-ONE AND A SON EIGHTEEN.

THE COURT: AND HOW OLD ARE YOU?

JUROR DOUGHERTY: I AM FORTY-SIX.

THE COURT: THANK YOU VERY MUCH.

JUROR ELOI: I AM SIXTY-THREE.

THE COURT: SIXTY-THREE. OKAY. YOU DIDN'T HAVE TO TELL US. MR. PANIUSKI.

JUROR PANIUSKI: MY NAME IS LAWRENCE JOHN PANIUSKI. I LIVE AT 3001 REIDWAY, HERE IN LAKE CHARLES. AGE FIFTY-SIX. AND I HAVE THREE CHILDREN. AND MY WIFE STAYS HOME. AND I WORK FOR ORKIN PEST CONTROL, SERVICE TECHNICIAN.

THE COURT: ALL RIGHT. THANK YOU. MRS. FRUGE.

JUROR FRUGE: MY NAME IS NIKKI FRUGE. I LIVE AT ROUTE 4, BOX 524, IN MOSS BLUFF. I WORK FOR MAGNOLIA LIFE INSURANCE AS A MAIL CLERK, FILE CLERK. MY HUSBAND WORKS AT VISTA CHEMICALS. I HAVE THREE CHILDREN. AND I AM THIRTY-ONE.

THE COURT: ALL RIGHT. WHAT DOES YOUR HUSBAND DO FOR VISTA?

JUROR FRUGE: CHIEF WAREHOUSEMAN.

THE COURT: THANK YOU. MR. WILLIAMS.

JUROR WILLIAMS: CHARLES T. WILLIANS. ROUTE 1, ANACOCO, LOUISIANA. ME AND MY WIFE OWN TWO COMPANIES, GENERAL DIRT CONTRACTING BUSINESS. I AM FORTY-FOUR YEARS OLD. AND WE HAVE THREE CHILDREN. AND SHE IS MY PARTNER AND

BOOKKEEPER.

THE COURT: THANK YOU, SIR. ALL RIGHT. MRS. MCBRIDE.

JUROR MCBRIDE: ELOISE MCBRIDE. I AM A WIDOW. I WORK AS A CASHIER. AND I HAVE FOUR CHILDREN.

THE COURT: AND YOU ARE OVER EIGHTEEN?

JUROR MCBRIDE: AND I AM OVER EIGHTEEN.

THE COURT: AND WHERE DO YOU WORK, MRS. MCBRIDE?

JUROR MCBRIDE: MARKET BASKET IN MOSS BLUFF.

THE COURT: THANK YOU, MA'AM. MR. SOILEAU.

JUROR SOILEAU: MY NAME IS PHIL SOILEAU. I AM THIRTY-SEVEN. I AM A SERVICE ENGINEER FOR PITNEY BOWES. I HAVE A WIFE THAT IS A BEAUTIFUL HOMEMAKER. AND I HAVE THREE CHILDREN.

THE COURT: THANK YOU, MR. SOILEAU. MR. DUGAS.

JUROR DUGAS: MY NAME IS WAVELLE DUGAS. I AM TWENTY-SEVEN. I AM A WAREHOUSE MANAGER IN WELSH. AND I HAVE TWO KIDS.

THE COURT: THANK YOU, SIR. MRS. YELLOTT.

JUROR YELLOTT: MY NAME IS ROBERTA YELLOTT. I LIVE AT 436 WASHINGTON STREET, IN LAKE CHARLES. I AM ASSISTANT PROFESSOR OF MATHEMATICS AT MCNEESE. MY HUSBAND TEACHES GEOMETRY AND COACHES BASKETBALL AT ST. LOUIS HIGH SCHOOL. AND WE HAVE THREE CHILDREN.

THE COURT: THANK YOU, MA'AM. MR. SMITH.

JUROR SMITH: MY NAME IS RAY SMITH. I LIVE AT ROUTE 1, BOX 4, RAGLEY. AND LET'S SEE. I AM THIRTY-THREE YEARS OLD. I WORK FOR THE U. S. POSTAL SERVICE HERE IN LAKE CHARLES AS A LETTER CARRIER. MY WIFE IS A CLERK FOR THE POSTAL SERVICE. AND NO KIDS.

THE COURT: YOUR WIFE IS WHAT, SIR?

JUROR SMITH: A CLERK FOR THE POSTAL SERVICE, DOWNSTAIRS, ALSO.

THE COURT: ALL RIGHT. AND YOU HAVE HOW MANY CHILDREN?

JUROR SMITH: NO KIDS.

THE COURT: THANK YOU, SIR. MR. ALBARADO.

JUROR ALBARADO: JAMES ALBARADO. I LIVE AT ROUTE 3, BOX 442, LAKE CHARLES. FORTY-TWO YEARS OLD. I AM A WELDER BY TRADE. I HAVE TWO KIDS. MY WIFE IS OFFICE MANAGER FOR A COMPUTER COMPANY HERE IN LAKE CHARLES.

THE COURT: THANK YOU. MR. WHITE.

JUROR WHITE: MY NAME IS JOHN WHITE. I LIVE AT 102 WILLOW LANE, RAGLEY. I AM A CONSTRUCTION PAINTER. AND I AM THIRTY-NINE. MY WIFE IS A HOMEMAKER.

THE COURT: ANY CHILDREN?

JUROR WHITE: TWO.

THE COURT: THANK YOU, SIR. MR. ASKEW.

JUROR ASKEW: JOHN ASKEW. I AM FORTY-TWO YEARS OLD. I LIVE AT 732 ESPLANADE IN LAKE CHARLES. I AM BRANCH

MANAGER OF METROPOLITAN INSURANCE COMPANY HERE IN LAKE CHARLES. I HAVE TWO CHILDREN. AND MY WIFE IS A HOMEMAKER.

THE COURT: THANK YOU VERY MUCH. ALL RIGHT. GENTLEMEN, DO YOU WANT TO APPROACH THE BENCH, PLEASE?

(WHEREUPON AN OFF-THE-RECORD DISCUSSION WAS HAD BETWEEN COURT AND COUNSEL AT THE BENCH.)

THE COURT: MR. WILLIAMS.

(PROCEEDINGS AT THE BENCH, WITH JUROR WILLIAMS AND ALL COUNSEL PRESENT.)

THE COURT: MR. WILLIAMS, I WANT TO ASK YOU THESE QUESTIONS BRIEFLY BECAUSE I WANT TO MAKE SURE I UNDERSTAND. NOW, IN THIS PARTICULAR CASE WE HAVE A PERSON WHO WAS NOT WORKING FOR LEESVILLE COMPANY, LEESVILLE CONCRETE COMPANY. HE ALLEGES SOME FAULT ON THEIR PART IN CAUSING HIS ACCIDENT. NOW, WHAT YOU WERE TELLING ME, AS A CONTRACTOR, YOU WERE BEING SUED TO PAY AN EMPLOYEE OF ANOTHER COMPANY?

JUROR WILLIAMS: SAME THING. YES, SIR.

THE COURT: SAME THING. YES, SIR. AND ONLY YOU CAN ANSWER. AND I AM JUST WONDERING IF YOU FEEL LIKE YOU CAN PUT ASIDE YOUR SITUATION, IF YOU HEAR THIS EVIDENCE DEVELOP, COULD YOU PUT ASIDE YOUR SITUATION AS IF YOU NEVER HAD--

JUROR WILLIAMS: I DON'T KNOW. IT WOULD BE HARD FOR ANY HUMAN BEING TO DO THAT.

THE COURT: THAT IS THE REASON I BROUGHT IT UP.

JUROR WILLIAMS: YES, SIR.

THE COURT: I THINK MAYBE UNDER THOSE CIRCUMSTANCES, BECAUSE OF YOUR POSITION, I THINK MAYBE I MIGHT BETTER LET YOU OFF THIS ONE AND GET YOU ON ANOTHER ONE. MR. HONEYCUTT, DO YOU HAVE ANY PROBLEM WITH THAT, SIR?

MR. HONEYCUTT: NO, SIR.

THE COURT: JUST GO AND HAVE A SEAT, AND WE WILL LET YOU GO IN A MINUTE.

(PROCEEDINGS IN OPEN COURT, JURY PRESENT.)

THE COURT: MR. WHITE, SIR, WOULD YOU COME ON UP, PLEASE?

(PROCEEDINGS AT THE BENCH, WITH JUROR WHITE AND ALL COUNSEL PRESENT.)

THE COURT: MR. WHITE, NOW, YOU SAID THAT YOU HAVE A BROTHER WHOSE WIFE WAS RAPED.

JUROR WHITE: YES, SIR.

THE COURT: WAS THIS A BLACK FELLOW THAT RAPED YOUR BROTHER'S WIFE?

JUROR WHITE: YES, SIR.

THE COURT: IS THAT WHAT YOU HAD YOUR PROBLEM WITH HERE?

JUROR WHITE: YES, SIR.

THE COURT: DO YOU FEEL YOU WOULD HOLD IT AGAINST THIS MAN BECAUSE A BLACK RAPED YOUR SISTER?

JUROR WHITE: I WOULD LIKE TO SAY NO, BUT I CAN'T FEEL SURE ABOUT IT.

THE COURT: ALL RIGHT. OKAY.

JUROR WHITE: I AM BEING AS HONEST AS I CAN BE.

THE COURT: ALL RIGHT. OKAY. DO YOU HAVE ANY PROBLEM, MR. HONEYCUTT, WITH THE COURT EXCUSING HIM?

MR. HONEYCUTT: NO, SIR.

THE COURT: ALL RIGHT. MR. DOYLE, DO YOU, SIR?

MR. DOYLE: NO, SIR.

THE COURT: ALL RIGHT. THANK YOU. GO AHEAD AND HAVE A SEAT.

THE COURT: YOU SEE WHY I WANT TO DO THIS PRIVATELY. BECAUSE I DON'T WANT TO CONTAMINATE THE JURY.

MR. DOYLE: YES, SIR. I APPRECIATE THAT.

THE COURT: ANY OTHER QUESTIONS, MR. DOYLE?

MR. DOYLE: I AM NOT SURE I UNDERSTOOD WHAT THAT FELLOW BRADLEY SAID HE DID FOR A LIVING.

THE COURT: BRADLEY, BUCKET TRUCK OPERATOR.

MR. DOYLE: OKAY.

THE COURT: THAT'S WHAT HE SAID, BUT HE SAID IT SO FAST. THAT'S WHY I HAD HIM REPEAT IT.

MR. DOYLE: I DON'T HAVE ANY OTHER QUESTION.

THE COURT: OKAY.

(PROCEEDINGS IN OPEN COURT, JURY PRESENT.)

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN. AS A JUDGE, I FEEL A LOT OF TIMES THAT WE HAVE TO LET THE JURY KNOW EVERYTHING THAT IS GOING ON. BUT I HAD SOME PRIVATE

QUESTIONS I WANTED TO ASK MR. WILLIAMS AND MR. WHITE, SO THAT I COULD DETERMINE FURTHER WHETHER THEY ARE QUALIFIED TO SERVE AS A JUROR. AND I HAVE MADE THE DETERMINATION THAT I AM GOING TO EXCUSE MR. WILLIAMS AND MR. WHITE. SO, GENTLEMEN, YOU ARE FREE TO GO. YOU DO NOT HAVE TO COME BACK. AND THE GOVERNMENT WILL MAIL YOU A CHECK PLUS YOUR TRAVELING EXPENSES IN THE NEXT TWO OR THREE WEEKS. THANK YOU SO MUCH FOR BEING SO WILLING TO PERFORM YOUR CIVIC RESPONSIBILITY. ALL RIGHT. DRAW TWO NAMES, MR. CHADDICK, PLEASE. THE FIRST WILL TAKE MR. WILLIAMS' SEAT, AND THE SECOND WILL TAKE MR. WHITE'S SEAT.

THE MARSHAL: AS I CALL YOUR NAME, WILL THE FIRST PERSON OCCUPY THIS EMPTY SEAT OVER HERE, PLEASE. NUMBER FORTY-TWO, HAROLD HERFORD. NUMBER THIRTY-NINE, MS. EDITH KLENK.

THE COURT: ALL RIGHT. FOR THE TIME BEING, I AM GOING TO DIRECT MY QUESTIONS TO MR. HERFORD AND MS. KLENK. FIRST OF ALL, DID YOU HEAR ME STATE WHAT THE CASE IS ABOUT, AND THE PARTIES INVOLVED?

JUROR HERFORD: YES, SIR.

THE COURT: ALL RIGHT. DID YOU HEAR ME INTRODUCE THE ATTORNEYS TO THE JURY?

JUROR HERFORD: YES, SIR.

THE COURT: DO EITHER OF YOU KNOW ANY OF THE ATTORNEYS OR ANY OF THE PARTIES INVOLVED IN THIS CASE?

JUROR HERFORD: I KNOW THIS NICE GENTLEMAN OVER HERE, MR. DOYLE.

THE COURT: ALL RIGHT, SIR.

JUROR HERFORD: WE GO TO THE SAME CHURCH.

THE COURT: WELL, THE FACT THAT YOU GO TO THE SAME CHURCH AS MR. DOYLE, WOULD THAT, IN ANYWAY, INFLUENCE YOUR DECISION IN THIS CASE?

JUROR HERFORD: NO.

THE COURT: AND AGAIN, IN PARTICULAR, SINCE YOU SAY YOU GO TO THE SAME CHURCH AS MR. DOYLE, IF YOU WERE TO SIT ON THIS JURY AND RENDER A VERDICT IN FAVOR OF THE DEFENDANT, WOULD YOU FEEL, THE NEXT TIME YOU RAN INTO MR. DOYLE, THAT WOULD, IN ANYWAY, EMBARRASS YOU?

JUROR HERFORD: NO, SIR.

THE COURT: IN OTHER WORDS, YOU WOULD BE WILLING TO CALL IT AS YOU SEE IT BASED ON THE LAW AND THE EVIDENCE AND NOTHING ELSE?

JUROR HERFORD: THAT'S CORRECT.

THE COURT: MS. KLENK, DO YOU HAVE ANY COMMENT ON THAT?

JUROR KLENK: NO, SIR.

THE COURT: ALL RIGHT. YOU HAVE HEARD ME ASK THE OTHER QUESTIONS ABOUT SERVING ON JURY DUTY. HAVE EITHER OF YOU SERVED ON A JURY?

JUROR HERFORD: I SERVED ON THE JURY IN THIS COURT

IN JANUARY OF LAST YEAR.

THE COURT: WHAT KIND OF CASE? DO YOU REMEMBER?

JUROR HERFORD: THE CASE WITH THE LABORERS LOCAL--WELL, I DON'T RECALL WHETHER--

THE COURT: OH, WAS THAT THE CASE OF UNITED STATES OF AMERICA VERSUS FREEMAN LAVERGNE AND MOSE COLLINS?

JUROR HERFORD: YES, SIR.

THE COURT: YOU SERVED ON THAT JURY, SIR? THAT WAS A CRIMINAL CASE. ALL RIGHT. ANY OTHER CASES THAT YOU HAVE SERVED ON?

JUROR HERFORD: OH, MANY YEARS AGO I SERVED ON ONE IN THE PARISH COURT. I SUPPOSE YOU WOULD CALL IT A DAMAGE CASE. BUT IT RESULTED IN NO PAYMENT.

THE COURT: ALL RIGHT. MS. KLENK, DID YOU EVER SERVE ON A JURY BEFORE?

JUROR KLENK: I SERVED ON A GRAND JURY IN DERIDDER.

THE COURT: ALL RIGHT.

JUROR KLENK: ABOUT TWO YEARS AGO. AND ON A CASE HERE ABOUT A YEAR AND A HALF AGO.

THE COURT: ALL RIGHT. HAS ANYONE ATTEMPTED TO CONTACT EITHER OF YOU CONCERNING THIS CASE? ALL RIGHT. HAVE ANY OF YOU, OR ANY MEMBERS OF YOUR IMMEDIATE FAMILY EVER FILED A SUIT OR CLAIM AGAINST SOMEONE AS A RESULT OF AN ACCIDENT?

JUROR HERFORD: NO.

THE COURT: OR HAS ANYONE EVER FILED A SUIT OR CLAIM AGAINST YOU OR ANY MEMBER OF YOUR IMMEDIATE FAMILY? DO EITHER OF YOU HAVE AN' BIAS OR PREJUDICE AGAINST SOMEONE WHO BRINGS A LAWSUIT SEEKING TO RECOVER DAMACES OR INJURIES HE ALLEGES HE INCURRED? ALL RIGHT. THEN, MR. HERFORD, WE WILL START WITH YOU FIRST. WOULD YOU STAND AND GIVE YOUR NAME, ADDRESS, AGE, OCCUPATION AND SPOUSE'S OCCUPATION, AND NUMBER OF CHILDREN?

JUROR HERFORD: I AM HAROLD HERFORD. I LIVE AT 800 DOLBY STREET, LAKE CHARLES. I AM RETIRED. I AM MARRIED. MY WIFE HAS TWO CHILDREN, I HAVE THREE CHILDREN. WE HAVE A BUNCH OF GRANDKIDS. ANYTHING ELSE?

THE COURT: ALL RIGHT. AND WHAT DID YOU DO BEFORE YOU RETIRED, SIR?

JUROR HERFORD: I WORKED IN A REFINERY, CONOCO REFINERY, IN WESTLAKE.

THE COURT: AND WHAT WAS YOUR LAST JOB?

JUROR HERFORD: OPERATOR FOREMAN OVER THE COKING UNIT.

THE COURT: ALL RIGHT, SIR. THANK YOU VERY MUCH, SIR. MS. KLENK.

JUROR KLENK: MY NAME IS EDITH KLENK. I LIVE AT 8 CATHY DRIVE, DERIDDER, LOUISIANA. SIXTY YEARS OLD. I WORK FOR TWO DOCTORS AT DOCTORS CLINIC AS AN ADMINISTRATOR. AND I

HAVE FOUR CHILDREN. AND MY HUSBAND IS DECEASED.

THE COURT: ALL RIGHT. AND YOU ARE OVER EIGHTEEN?

JUROR KLENK: YES, SIR.

THE COURT: ALL RIGHT. THANK YOU. ALL RIGHT. MAY I SEE THE ATTORNEYS AGAIN, PLEASE?

(WHEREUPON AN OFF-THE-RECORD DISCUSSION WAS HAD BETWEEN COURT AND COUNSEL AT THE BENCH.)

THE COURT: MS. KLENK, I HAVE BEEN ADVISED THAT THE PLAINTIFF'S WIFE TAKES HER CHILD OR CHILDREN TO YOUR CLINIC. DO YOU KNOW THAT?

JUROR KLENK: I AM NOT AWARE OF IT RIGHT NOW. I COULD PROBABLY REFRESH MY MEMORY.

THE COURT: WELL, NO. BUT FOR AN EXAMPLE, THE WIFE MAY TESTIFY IN THIS CASE. AND I WANT TO KNOW IF YOU SAW HER, WOULD YOU RECOGNIZE HER?

JUROR KLENK: I PROBABLY WOULD.

THE COURT: ALL RIGHT. BUT THEN MY QUESTION WOULD BE, THE FACT THAT SHE MAY GO TO THE CLINIC WHERE YOU WORK, I WANT TO KNOW WOULD THAT, IN ANYWAY, INFLUENCE YOUR DECISION IN THIS CASE?

JUROR KLENK: NO, SIR. I DON'T THINK SO.

THE COURT: WELL--

JUROR KLENK: NO, IT WON'T.

THE COURT: ALL RIGHT. THANK YOU. MR. HERFORD,

LET ME JUST ASK YOU A QUESTION. AND I WANT TO MAKE SURE THAT I UNDERSTAND CORRECTLY. YOU SEE, WHAT IS GOING TO BE HAPPENING HERE IS THROUGHOUT THE TRIAL THESE ATTORNEYS WILL BE ASKING QUESTIONS. AND AT THE END OF THE TRIAL, THEY WILL BE MAKING THEIR ARGUMENTS TO YOU. AND I WANT TO KNOW, WILL YOU GIVE MORE CREDENCE TO THIS NICE MR. DOYLE THAT YOU SAY THAT YOU KNOW, AND YOU GO TO CHURCH WITH, OVER THE STATEMENTS OF MR. HONEYCUTT?

JUROR HERFORD: WELL, I SHOULDN'T HAVE SAID THIS NICE MR. DOYLE. THAT WAS JUST REPEATING WHAT YOU SAID.

THE COURT: OH, YOU DIDN'T DO ANYTHING WRONG, SIR.

JUROR HERFORD: NO. I DON'T HONESTLY FEEL THAT OUR RELATIONSHIP WOULD INFLUENCE MY OPINION, IN ANYWAY.

THE COURT: AND AGAIN, WHAT I WANT TO KNOW IS, IN THE EVENT YOU SHOULD END UP RULING, THE JURY RULES FOR THE DEFENDANT, THAT WHEN YOU RAN INTO MR. DOYLE, IT WOULD NOT, IN ANYWAY, EMBARRASS YOU?

JUROR HERFORD: NO.

THE COURT: IN OTHER WORDS, YOU ARE GOING TO CALL IT AS YOU SEE IT?

JUROR HERFORD: YES, SIR.

THE COURT: YOU ARE GOING TO LISTEN TO THEIR ARGUMENTS, BUT YOU ARE GOING TO LISTEN TO THE ARGUMENTS WITH RESPECT TO WHAT THEY ARGUE ABOUT WHAT THE EVIDENCE IS, AND

WHETHER YOUR INTERPRETATION OF THE EVIDENCE AGREES WITH WHAT THEY SAY?

JUROR HERFORD: YES, SIR.

THE COURT: AND YOU WILL NOT GIVE MORE TO HIM SIMPLY BECAUSE HE GOES TO THE SAME CHURCH AS YOU?

JUROR HERFORD: NO, SIR. I HAVEN'T KNOWN HIM THAT LONG. I JUST DO KNOW HIM.

THE COURT: ALL RIGHT. ALL RIGHT, LADIES AND GENTLEMEN. I AM NOW GOING TO SUBMIT TO YOU A LIST, CALL OFF NAMES OF WITNESSES, AND ASK IF YOU KNOW ANY OF THEM. AND YOU ARE GOING TO HAVE TO EXCUSE MY PRONUNCIATION OF SOME OF THEM. AND I MAY NEED THE LAWYERS TO HELP ME. FIRST IS FRED BOLGIANO, WILLIAM D. SINES, S-I-N-E-S. NO, I AM ASKING THE JURY IF THEY KNOW THEM. EUGENE BRICKHOUSE, DR. BRUCE E. RAZZER, CHARLES O. BETTINGER, DR. WILLIAM CRUZE, MRS. CRYSTAL EDMONSON.

THE CLERK: JUDGE.

THE COURT: OH, ALL RIGHT. YOU SAY YOU KNOW DR. CRUZE?

JUROR KLENK: I KNOW DR. CRUZE, YES, SIR. HE USED TO BE ASSOCIATED WITH OUR CLINIC.

THE COURT: ALL RIGHT. THE FACT THAT YOU KNOW HIM, WOULD YOU GIVE HIS TESTIMONY ANY MORE WEIGHT THAN ANY OTHER DOCTOR SIMPLY BECAUSE YOU KNOW HIM?

JUROR KLENK: NO.

THE COURT: OR WOULD YOU GIVE HIM LESS? YOU WOULD NOT GIVE HIM LESS WEIGHT EITHER, WOULD YOU?

JUROR KLENK: NO, SIR.

THE COURT: ALL RIGHT. CHARLES SCHRIBER, DR. CLARK GUNDERSON. MR. SOILEAU, DO YOU KNOW DR. GUNDERSON?

JUROR SOILEAU: DR. GUNDERSON WAS THE DOCTOR WHEN MY DAUGHTER BROKE HER ARM. HE WAS HER DOCTOR.

THE COURT: UH-HUH. NOW, WOULD THAT, IN ANYWAY, INFLUENCE YOUR DECISION?

JUROR SOILEAU: NO, SIR.

THE COURT: IN OTHER WORDS, AGAIN, I WILL ASK THE SAME QUESTION THAT I ASKED THE OTHER LADY. THE FACT THAT HE TREATED YOUR DAUGHTER, WOULD YOU GIVE HIS TESTIMONY MORE WEIGHT THAN ANY OTHER DOCTOR IN THIS CASE?

JUROR SOILEAU: NO, SIR.

THE COURT: MS. YELLOTT.

JUROR YELLOTT: DR. GUNDERSON TREATED MY ANKLE.

THE COURT: YOUR ANKLE?

JUROR YELLOTT: YES, SIR.

THE COURT: WOULD THAT CAUSE YOU ANY PROBLEM?

JUROR YELLOTT: NO, SIR.

THE COURT: IN OTHER WORDS, IF YOU DON'T AGREE WITH HIS TESTIMONY, THAT IS THE WAY IT WILL BE, IS THAT RIGHT?

JUROR YELLOTT: YES, SIR.

THE COURT: BECAUSE THERE WILL BE A LOT OF DOCTORS TESTIFY. AND YOU ARE GOING TO HAVE TO DETERMINE FROM ALL THESE DOCTORS WHO YOU BELIEVE AND WHO YOU DON'T BELIEVE, OR WHETHER YOU ACCEPT THEIR OPINIONS OR NOT, LET'S PUT IT THAT WAY. ALL RIGHT. ANYONE ELSE ON THE BACK ROW? ALL RIGHT. DR. GILLES R. MORIN, RICK TANNER, MRS. FRED BOLGIANO, KENNETH GORDON, D. L. ELLIOTT, SAMUEL JAMES, RICHARD THOMPSON, BERNICE CRYER, DR. PERCY MILLER, DR. GEORGE HEARN, LEONARD MICHAELS, PEGGY KELLY, DR. KENNETH BOUDREAUX, DR. J. STEWART WOOD, DR. JAMES T. MURPHY, REBECCA BROUSSARD, PAUL D. WARE, DR. WILLIAM AKINS, DR. R. DALE BERNAUER, DR. GREGORY D. LORD, DR. J. LANE SAULS, DR. FAYEZ SHAMIEH. WAIT, DID YOU KNOW DR. D. LORD?

JUROR KLENK: DR. SAULS.

THE COURT: OH, DR. SAULS.

JUROR KLENK: HE WAS ASSOCIATED WITH OUR CLINIC, ALSO.

THE COURT: HE WAS, AT ONE TIME?

JUROR KLENK: YES, SIR.

THE COURT: AND, AGAIN, YOU ARE TELLING YHIS COURT THAT YOU WILL NOT GIVE HIM ANY MORE WEIGHT, HIS TESTIMONY ANY MORE WEIGHT THAN ANY OTHER DOCTOR?

JUROR KLENK: NO, SIR.

THE COURT: UNLESS YOU ARE IMPRESSED WITH THE TESTIMONY HERE AS OPPOSED TO YOU KNOWING HIM?

JUROR KLENK: RIGHT.

THE COURT: ALL RIGHT. AND DR. WALTER T. SNOW. MR. ASKEW?

JUROR ASKEW: I KNOW DR. SHAMIEH SOCIALLY.

THE COURT: ALL RIGHT. THE FACT THAT YOU KNOW HIM SOCIALLY, WOULD THAT CAUSE YOU TO GIVE HIS TESTIMONY MORE WEIGHT THAN ANY OTHER DOCTOR IN THIS CASE, SIR?

JUROR ASKEW: NO, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU. GENTLEMEN, MAY I SEE YOU AT THE BENCH AGAIN, PLEASE?

(WHEREUPON AN OFF-THE-RECORD DISCUSSION WAS HAD BETWEEN COURT AND COUNSEL AT THE BENCH.)

THE COURT: MS. KLENK, WOULD YOU COME UP, PLEASE, MA'AM? MR. WILLIAMS.

(PROCEEDINGS AT THE BENCH.)

THE COURT: MS. KLENK, I WANT TO JUST MAKE SURE WE DON'T PUT YOU IN AN EMBARRASSING POSITION. AND ONLY YOU CAN ANSWER. NOW, YOU KNOW SOME OF THESE DOCTORS?

JUROR KLENK: YES, SIR.

THE COURT: BUT, NOW, YOU SAY YOU ARE THE ADMINISTRATOR AT THE HOSPITAL?

JUROR KLENK: AT THE CLINIC.

THE COURT: AT THE CLINIC?

JUROR KLENK: YES, SIR.

THE COURT: NOW, IF I AM NOT MISTAKEN, I THINK

MAYBE SOME OTHER DOCTOR TREATED THIS MAN WHEN HE FIRST GOT HURT THERE IN THIS CLINIC.

JUROR KLENK: THAT COULD BE TRUE. I AM NOT SURE.

THE COURT: ALL RIGHT. BUT WHAT WE ARE REALLY CONCERNED ABOUT IS THAT HAVING WORKED WITH THESE DOCTORS, WE ARE CONCERNED, IF NOT CONSCIOUSLY BUT SUBCONSCIOUSLY, THAT COULD INTERFERE WITH YOUR DECISION IN THIS CASE.

JUROR KLENK: OKAY.

THE COURT: BUT I AM NOT SAYING IT WILL, BUT I AM POINTING OUT WHAT OUR CONCERNS ARE.

JUROR KLENK: UH-HUH.

THE COURT: AND WE CERTAINLY DON'T WANT TO PUT YOU IN AN EMBARRASSING POSITION. BECAUSE IF SOME OF THESE FELLOWS HAPPEN TO COME BACK TO THE CLINIC, ALTHOUGH THE FIRST QUESTION YOU WILL BE DECIDING IS LIABILITY, WHICH WOULDN'T HAVE ANYTHING TO DO WITH TREATMENT.

JUROR KLENK: I UNDERSTAND.

THE COURT: YOU SEE, BUT I AM JUST WONDERING IF THIS WILL, IN ANYWAY, GIVE YOU ANY PROBLEMS?

JUROR KLENK: WELL, IT IS A SMALL TOWN. THE DOCTORS ALL GO TO THE SAME CHURCH, YOU KNOW, AS WE DO. SO I WOULD BE RUNNING INTO THEM. I DON'T KNOW IF THEY WOULD FEEL--I WOULD HAVE NO--

THE COURT: YOU SEE--

JUROR KLENK: --PROBLEM WITH IT. BUT I DON'T KNOW

IF THEY WOULD.

THE COURT: LET ME GIVE YOU WHAT MAY BE AN ISSUE IN THE CASE. WHAT THE ISSUE MAY BE IS WHETHER THIS ACCIDENT WHICH THIS MAN CONTENDS CAUSED HIM THE INJURY THAT HE HAS NOW, AND THE OTHER SIDE IS SAYING THE ACCIDENT DID NOT CAUSE THE THINGS HE IS COMPLAINING ABOUT NOW. AND THAT IS WHERE THE PROBLEM COMES IN. YOU SEE, IF YOU KNOW THESE PEOPLE, WOULD YOU TURN AROUND AND SAY, WELL, AFTER WORKING THERE I BELIEVE HIM, WHEREAS IF YOU HEARD ANOTHER DOCTOR SAY, NO, IT WASN'T CAUSED BY THE ACCIDENT, HOW IT WOULD AFFECT YOUR DECISION.

JUROR KLENK: I THINK ONE THAT YOU KNEW WOULD MAYBE INFLUENCE YOU A LITTLE.

THE COURT: WELL, LET ME SAY THIS. I DON'T HAVE ANY PROBLEM, I CAN EXCUSE YOU IF YOU THINK IT MIGHT PUT YOU IN AN EMBARRASSING POSITION.

JUROR KLENK: OKAY.

THE COURT: BECAUSE WE HAVE OTHERS.

JUROR KLENK: I THINK I WOULD RATHER NOT SERVE ON THIS JURY IF IT WOULDN'T CAUSE--I COULD BE--

THE COURT: YOU COULD TRY TO DO AS WELL AS YOU COULD.

JUROR KLENK: YES, SIR. BUT I WOULD NOT MIND BEING EXCUSED. THAT WOULD NOT BOTHER ME.

THE COURT: ALL RIGHT. MR. DOYLE?

MR. DOYLE: JUDGE, I CERTAINLY HAVE NO OBJECTION.

THE COURT: MR. HONEYCUTT?

MR. HONEYCUTT: MS. KLENK HAD INDICATED IT WOULDN'T BOTHER HER TO SEE THE DOCTORS IF IT WOULDN'T BOTHER THEM. I AM NOT SURE SHE UNDERSTANDS THE DOCTORS ARE NOT TO COME LIVE TO THE TRIAL HERE. THEY WOULDN'T KNOW SHE IS ON THE JURY. IN ESSENCE, THEY ARE ALL VIDEO DOCTORS. SO THERE WOULDN'T BE THE FACT-TO-FACE CONFRONTATION.

THE COURT: DO YOU UNDERSTAND WHAT HE IS SAYING?

JUROR KLENK: YES, SIR.

THE COURT: NO DOCTOR WILL APPEAR HERE LIVE.

JUROR KLENK: OKAY. I COULD LOOK AT THE EVIDENCE WITHOUT ANY PREJUDICE, I AM SURE. BUT IF IT IS GOING TO BE A PROBLEM, I DON'T WANT ANY OF YOU ALL TO THINK I MIGHT BE SWAYED.

THE COURT: NO, MA'AM. IT IS NOT A QUESTION OF WHAT THEY FEEL.

JUROR KLENK: OKAY.

THE COURT: NO. IT IS SIMPLY TO MAKE SURE, WHAT THE ULTIMATE QUESTION IS, WHETHER YOU THINK YOU CAN BE FAIR AND IMPARTIAL.

JUROR KLENK: YES, SIR, I THINK I CAN.

THE COURT: THAT'S WHAT HE WANTS, AND THAT'S WHAT HE WANTS.

JUROR KLENK: OKAY.

THE COURT: IN OTHER WORDS, ALL WE ARE SAYING, IF YOU WORK FOR SOME PEOPLE, THEN IT IS KIND OF DIFFICULT TO SAY, IT MAY BE CONTRARY TO WHAT THEY THINK.

JUROR KLENK: YES, SIR.

THE COURT: AND THEN ON THE OTHER HAND, YOU COULD RUN INTO THESE PEOPLE AGAIN.

JUROR KLENK: YES, SIR, PROBABLY SO.

THE COURT: AND THEN IF THEY FIND OUT YOU HAVE BEEN ON THE JURY, SOME OF THEM MAY BE OFFENDED.

JUROR KLENK: RIGHT.

THE COURT: SINCE IT IS THE PLAINTIFF'S FAMILY GOING TO THE CLINIC.

JUROR KLENK: YES, SIR. EVEN THOUGH I CAN'T PLACE THEM RIGHT AT THIS MINUTE, I AM SURE THEY WILL BE COMING BACK. AND IT MIGHT MAKE THEM FEEL--

THE COURT: WELL, WHAT WOULD YOU PREFER TO DO, MA'AM, IN THIS SITUATION?

JUROR KLENK: I WOULD PREFER NOT TO SERVE, I THINK.

THE COURT: ON THIS CASE?

JUROR KLENK: YES, SIR.

THE COURT: SOME OTHER CASE MAYBE, BUT NOT THIS ONE?

JUROR KLENK: RIGHT.

THE COURT: BECAUSE OF THE RELATIONSHIP?

JUROR KLENK: RIGHT.

THE COURT: TO THE PARTIES INVOLVED AND SOME OF THE WITNESSES?

JUROR KLENK: RIGHT.

THE COURT: OKAY. I THINK THE ONLY FAIR THING, BECAUSE I DON'T FEEL THAT A JUROR SHOULD BE PUT IN A POSITION THAT THEY HAVE TO BE CONCERNED WITH RENDERING A VERDICT, AND KNOWINGLY SAYING, WELL, I WANT TO MAKE SURE I AM DOING THIS AS OPPOSED TO THIS. I THINK IT COULD PUT YOU IN A POSITION WHERE YOU WOULD MAYBE OVERREACT.

JUROR KLENK: SOMETIMES I OVERREACT THE OTHER WAY.

THE COURT: THAT'S TRUE. ALL RIGHT. THANK YOU, MA'AM. WE ARE GOING TO EXCUSE YOU, AND YOU CAN GO HOME. AND YOU DON'T HAVE TO COME BACK UNTIL YOU GET ANOTHER NOTICE.

JUROR KLENK: OKAY.

THE COURT: YES, MA'AM.

(PROCEEDINGS IN OPEN COURT, JURY PRESENT.)

THE COURT: MR. CHADDICK, CALL ONE NAME, PLEASE.

THE MARSHAL: NUMBER FOUR, ODGEN ABSHIRE.

THE COURT: MR. ABSHIRE, DID YOU HEAR ME STATE WHAT THE CASE WAS ABOUT?

JUROR ABSHIRE: YES, SIR.

THE COURT: DO YOU KNOW ANYTHING ABOUT THIS CASE OTHER THAN WHAT YOU HAVE HEARD IN THE COURTROOM TODAY?

JUROR ABSHIRE: NO, SIR.

THE COURT: DID YOU KNOW ANYTHING AS TO ALL THE OTHER QUESTIONS I HAVE ASKED THE OTHER JURORS THAT YOU SHOULD ANSWER IN THE NEGATIVE?

JUROR ABSHIRE: NO, SIR.

THE COURT: HAVE YOU EVER FILED A SUIT OR CLAIM AGAINST ANYONE?

JUROR ABSHIRE: NO, SIR.

THE COURT: OR ANY MEMBER OF YOUR IMMEDIATE FAMILY?

JUROR ABSHIRE: I BEG YOUR PARDON?

THE COURT: OR ANY MEMBER OF YOUR IMMEDIATE FAMILY EVER FILE SUIT?

JUROR ABSHIRE: NO, SIR.

THE COURT: ANYONE EVER FILE A SUIT OR CLAIM AGAINST YOU, OR ANY MEMBER OF YOUR IMMEDIATE FAMILY?

JUROR ABSHIRE: NO, SIR.

THE COURT: ALL RIGHT. WHY DON'T YOU JUST STAND, SIR, AND GIVE YOUR NAME, ADDRESS, AGE, ETC.?

JUROR ABSHIRE: I CAN GIVE YOU EVERYTHING BUT MY ADDRESS.

THE COURT: ALL RIGHT, SIR.

JUROR ABSHIRE: I JUST MOVED TO A NEW PLACE.

THE COURT: ALL RIGHT.

JUROR ABSHIRE: I AM CAMPING. MY NAME IS ODGEN

ABSHIRE. I LIVE AT 3619 TEXAS STREET, APARTMENT 50.

THE COURT: THAT IS IN LAKE CHARLES?

JUROR ABSHIRE: LAKE CHARLES. I AM RETIRED. SIXTY-SEVEN YEARS OLD. I GOT FOUR KIDS. MY WIFE IS RETIRED.

THE COURT: ALL RIGHT. AND WHAT DID YOU DO BEFORE YOU RETIRED, SIR?

JUROR ABSHIRE: I WAS MANAGER FOR BOYCE MACHINERY.

THE COURT: WHAT? YOU WERE SALES MANAGER OR GENERAL MANAGER OR WHAT?

JUROR ABSHIRE: BRANCH MANAGER.

THE COURT: BRANCH MANAGER HERE IN LAKE CHARLES, SIR?

JUROR ABSHIRE: YES, SIR, IN LAKE CHARLES.

THE COURT: ALL RIGHT, SIR. WHAT DID YOUR WIFE DO BEFORE SHE RETIRED?

JUROR ABSHIRE: SHE WAS A NURSE'S AID AT MEMORIAL HOSPITAL.

THE COURT: ALL RIGHT, SIR. THANK YOU VERY MUCH. YOU MAY BE SEATED. ALL RIGHT, GENTLEMEN. ONE MORE TIME, PLEASE.

(WHEREUPON AN OFF-THE-RECORD DISCUSSION WAS HAD BETWEEN COURT AND COUNSEL AT THE BENCH.)

(PROCEEDINGS IN OPEN COURT, JURY PRESENT.)

THE COURT: I WANT TO APOLOGIZE TO YOU, MR. ABSHIRE, BUT I AM GOING TO ASK YOU A QUESTION. I THINK IT IS

A STUPID ONE, BUT I HAVE BEEN REQUESTED TO ASK YOU, SO I AM GOING TO ASK YOU. DO YOU KNOW WHAT A CONCRETE TRUCK IS?

JUROR ABSHIRE: YES, SIR.

THE COURT: I THOUGHT YOU WOULD.

JUROR ABSHIRE: YES, SIR.

THE COURT: AND DO YOU KNOW WHAT A CURB AND GUTTER MACHINE IS?

JUROR ABSHIRE: A WHAT, SIR?

THE COURT: A CURB AND GUTTER MACHINE?

JUROR ABSHIRE: YES, SIR.

THE COURT: OKAY. ALL RIGHT.

(WHEREUPON AN OFF-THE-RECORD DISCUSSION WAS HAD BETWEEN COURT AND COUNSEL AT THE BENCH.)

(PROCEEDINGS IN OPEN COURT, JURY PRESENT.)

THE COURT: DO YOU KNOW ANY OF THE WITNESSES' NAMES WHO I CALLED OFF, MR. ABSHIRE?

JUROR ABSHIRE: NO, SIR.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH. LADIES AND GENTLEMEN, I APOLOGIZE FOR TAKING SO LONG TO DO THIS JOB. NORMALLY, WE FINISH IT IN HALF THAT TIME. WE ARE GOING TO TAKE A BREAK AND ASK YOU TO COME BACK IN TEN MINUTES, AND THEN WE ARE GOING TO TELL YOU WHO WILL SERVE AND WHO WON'T SERVE. SO WE WILL TAKE A BREAK. YOU CAN WALK AROUND OUTSIDE, BUT COME BACK AND OCCUPY THE SAME SEATS YOU ARE OCCUPYING. WITH THAT, COURT IS IN RECESS FOR TEN

MINUTES.

(RESUMING AFTER A RECESS.)

(PROCEEDINGS IN CHAMBERS, ALL COUNSEL PRESENT.)

THE COURT: ALL RIGHT, MR. WILLIAMS. THE COURT HAS BEFORE IT A MOTION BY DEFENDANTS TO QUASH THE TAKING OF A DEPOSITION OF--WHO WAS THAT?

MR. DOYLE: MRS. BOLGIANO, SAMUEL JAMES AND REBECCA BROUSSARD. BUT IT WAS PRIMARILY ABOUT HER.

THE COURT: AND THE COURT HAD A CONFERENCE IN THIS MATTER, AND THE COURT MADE A RULING. MR. DOYLE, DO YOU WANT TO PUT THE RULING ON THE RECORD?

MR. DOYLE: YES, SIR. UNDER THE RULE, THE DEPOSITION WOULD BE QUASHED BECAUSE THEY WERE NOTICED OUTSIDE THE CONTEMPLATION OF YOUR LOCAL RULE, WHICH REQUIRED THAT DISCOVERY BE COMPLETED THIRTY DAYS PRIOR TO TRIAL, WHICH ALL SIDES ACKNOWLEDGED. BUT BECAUSE OF THE NATURE OF THE TESTIMONY WE WERE TRYING TO ASCERTAIN FROM AT LEAST MS. BOLGIANO, WHO HAD NEVER BEEN DEPOSED BEFORE, YOU INDICATED THAT SINCE SHE APPARENTLY IS GOING TO TESTIFY ABOUT BRIBERY, OR SOME ALLEGED BRIBERY, THAT AFTER THE PLAINTIFF HAD AN OPPORTUNITY TO GIVE HIS DIRECT EXAMINATION ON THE WITNESS STAND, THAT YOU WERE GOING TO CONDUCT AN IN-CHAMBERS INTERVIEW, WITH COUNSEL PRESENT, WITH WITNESSES WHO HAD THIS ALLEGED BRIBERY TESTIMONY TO GIVE, SO YOU COULD MAKE SOME FINDING AS TO WHETHER IT WOULD BE ALLOWED, I SUPPOSE, OR

WHETHER IT WAS MAYBE JUST TO GIVE ALL SIDES AN OPPORTUNITY TO DETERMINE WHAT THEY WERE GOING TO SAY. I DON'T REALLY KNOW THE PURPOSE OF THE IN-CHAMBERS HEARING. BUT I KNOW IT WAS DISCUSSED AT THE TIME WE TALKED ABOUT THE DEPOSITIONS.

THE COURT: AND, MR. HONEYCUTT, BASICALLY, IS THAT CORRECT?

MR. HONEYCUTT: THAT IS BASICALLY MY UNDERSTANDING. SIMPLY THE DEPOSITIONS WERE QUASHED AND AFTER THE PLAINTIFF TESTIFIED ON DIRECT, YOU WISHED TO INTERVIEW THE WITNESS ON THE BRIBERY QUESTION IN CHAMBERS.

THE COURT: LET ME SEE IF I CAN RECALL IT CORRECTLY, THAT BEFORE I WOULD ALLOW YOU TO ASK ANY QUESTION ABOUT THE BRIBERY--

MR. DOYLE: THAT'S RIGHT.

THE COURT: --I WOULD INTERVIEW THE WITNESSES?

MR. DOYLE: THAT'S RIGHT.

THE COURT: I WOULD HAVE THE INFORMATION, AND THEN I WOULD THEN DECIDE WHETHER YOU SHOULD BE GRANTED PERMISSION TO INQUIRE AS TO THIS QUESTION, ISN'T THAT WHAT YOU RECALL?

MR. HONEYCUTT: I BELIEVE THAT IS CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT. LET THE RECORD REFLECT THE COURT'S RULING. AND THIS REFLECTS TAKING CARE OF THE MOTION TO QUASH THE TAKING OF THE DEPOSITIONS, WHICH I HAVE

BEFORE ME. ALL RIGHT. THAT TAKES CARE OF THAT. ALL RIGHT. WELL, MR. DOYLE, IS THIS YOURS, SIR?

MR. DOYLE: JUDGE, I AM SORRY.

THE COURT: WOULD YOU CHANGE THAT, PLEASE?

MR. DOYLE: YES, SIR. THAT IS A FORCE OF HABIT, JUDGE.

THE COURT: LET THE RECORD REFLECT AND NOTE THE CHANGE, BOTH SAID CHALLENGES FOR THE DEFENDANT. ALL RIGHT. BUT I WANT TO MAKE SURE--

MR. HONEYCUTT: THAT IS MINE, JUDGE.

THE COURT: THE PLAINTIFF CHALLENGES MR. PANIUSKI, NUMBER TWENTY-EIGHT; DUGAS, NUMBER FIVE; ASKEW, NUMBER THIRTY-TWO. THE DEFENDANT CHALLENGES NUMBER THREE, COMBS; NUMBER FORTY-TWO, HAROLD HERFORD; AND NUMBER TWELVE, SIMMONS.

MR. DOYLE: YOUR HONOR, I HAVE AN OBJECTION TO MAKE FOR THE RECORD.

THE COURT: ALL RIGHT, SIR.

MR. DOYLE: BASED ON THE CASE OF BATSON VERSUS KENTUCKY, YOUR HONOR. I WOULD ASK THAT THE COURT RECOGNIZE THAT TWO OF THE JURORS CHALLENGED PREEMPTORILY BY THE DEFENDANT IN THIS CASE ARE BLACK, AND THAT THE PLAINTIFF IS BLACK. BATSON VERSUS KENTUCKY IS CITED AT 106 SUPREME COURT REPORTER 1712. IT WAS DECIDED ON APRIL 30TH OF 1986, AND IT SPECIFICALLY RULES THAT THE SIXTH AND FOURTEENTH AMENDMENTS,

THE PORTION OF THE FOURTEENTH AMENDMENT DEALING WITH THE USE OF PREEMPTORY CHALLENGES TO EXCLUDE JURORS BASED S LY ON RACE WITHOUT A VOICED NEUTRAL EXPLANATION BY THE PARTY CHALLENGING VIOLATES A LITIGANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS. NOW, THE BATSON CASE WAS A CRIMINAL MATTER. BUT SOME OF THE QUOTATIONS FROM THE BATSON CASE THAT ARE PARTICULARLY IMPORTANT TO THIS ONE ARE ON PAGE 1716, WHICH RECOGNIZES THAT PREVIOUS DECISIONS LAID THE FOUNDATION FOR THE SUPREME COURT. AND I AM QUOTING, UNCEASING EFFORTS TO ERADICATE RACIAL DISCRIMINATION IN THE PROCEDURE USED TO SELECT THE VENIRE FROM WHICH INDIVIDUAL JURORS ARE DRAWN. SO UNDER BATSON VERSUS KENTUCKY, YOUR HONOR, I AM ARGUING THE DEFENDANT IN THE CASE IS NOT ENTITLED TO EXERCISE A PREEMPTORY CHALLENGE TO EXCLUDE A JUROR FROM SERVICE SOLELY BASED ON RACE, WHEN THAT RACE IS THE SAME AS THAT OF THE LITIGANT, AND OTHERWISE HE HAS TO ARTICULATE A NEUTRAL EXPLANATION.

THE COURT: LET ME ASK YOU A COUPLE OF QUESTIONS, MR. DOYLE.

MR. DOYLE: YES, SIR.

THE COURT: SINCE YOU ARE QUOTING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, SIR, WHAT DOES THE SIXTH AMENDMENT SAY?

MR. DOYLE: JUDGE, I DON'T HAVE IT QUOTED VERBATIM.

THE COURT: WELL, I WANT TO KNOW WHAT IT SAYS, SIR.

MR. DOYLE: I AM QUOTING OUT OF THE BATSON CASE.

THE COURT: NOW, YOU ARE MAKING AN ARGUMENT TO ME, SIR. I WANT YOU TO TELL ME WHAT DOES THE SIXTH AMENDMENT SAY, AND WHAT DOES IT DEAL WITH?

MR. DOYLE: I CAN'T QUOTE IT TO YOU.

THE COURT: LET'S GET IT OUT AND SEE.

MR. DOYLE: ALL RIGHT, SIR.

THE COURT: LET'S GET OFF THE RECORD AND GET IT AND SEE.

(WHEREUPON AN OFF-THE-RECORD DISCUSSION WAS HAD BETWEEN COURT AND COUNSEL.)

THE COURT: OKAY. LET'S GET ON THE RECORD. ALL RIGHT. THE COURT HAS JUST FINISHED GOING THROUGH THE PREEMPTORY CHALLENGES AND HAS THE JURY PICKED IN THIS CASE. AND NOW, MR. DOYLE, REPRESENTING THE PLAINTIFF, NOW OBJECTS TO THE DEFENDANT PREEMPTORY CHALLENGING TWO BLACK JURORS. I DON'T RECALL, BUT I KNOW WE HAD SEVERAL BLACK JURORS ON THE PANEL. I AM TOLD THERE WERE THREE. I DIDN'T COUNT THEM. I DON'T COUNT WHETHER THEY ARE BLACK OR WHITE. I JUST COUNT WHETHER WE HAVE TWELVE PEOPLE. NOW, MR. DOYLE HAS RAISED THE QUESTION AT THIS POINT, AND HIS ARGUMENT FIRST STARTED OFF UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. HE WANTS ME TO REQUIRE THE DEFENDANT

TO ELICIT, FOR ME TO ELICIT FROM THE DEFENSE COUNSEL WHY HE HAS CHALLENGED TWO BLACK JURORS IN THIS CASE. IT IS ALWAYS AMAZING TO THE COURT THAT THE PLAINTIFF IS BLACK, AND THE COURT NOTES THAT THE PLAINTIFF DID NOT CHALLENGE ANY OF THE BLACK JURORS. MAYBE I OUGHT TO ASK THE PLAINTIFF'S LAWYERS, SINCE HE WANTS TO CHALLENGE ONLY WHITE JURORS, BECAUSE HIS CLIENT IS BLACK, WHETHER HE SHOULD EXPLAIN WHY HE DID NOT REMOVE ANY OF THE BLACK JURORS. BUT I WON'T DO THAT. BUT I FIND THAT THIS IS AN ISSUE WHICH COUNSEL FOR THE PLAINTIFF SHOULD HAVE KNOWN BEFORE APPEARING IN COURT AND SELECTING THE JURY TODAY. THIS COURT DID NOT KNOW THE COLOR OF THE PLAINTIFF IN THIS CASE UNTIL THE CASE STARTED. IF COUNSEL FOR THE PLAINTIFF HAD AN ARGUMENT, HE CERTAINLY SHOULD HAVE GIVEN THE COURT THE PRIVILEGE AND OPPORTUNITY OF HAVING THE RIGHT TO RESEARCH AND CHECK OUT THE LAW. AND ALL HE HAS FURNISHED THE COURT IS THE CASE OF BATSON VERSUS KENTUCKY, WHICH IS A CRIMINAL CASE AND DEALS WITH CRIMINAL MATTERS. SO THE REQUEST BY PLAINTIFF'S ATTORNEY TO HAVE THE DEFENSE ATTORNEY EXPLAIN THE REASONS WHY HE EXERCISED A PREEMPTORY CHALLENGE THE WAY HE DID IS DENIED. NOW, DO YOU WANT TO ADD SOMETHING ELSE ON THE RECORD?

MR. DOYLE: NO, YOUR HONOR.

THE COURT: MR. HONEYCUTT, DO YOU WANT TO ADD SOMETHING ON THE RECORD, SIR?

MR. HONEYCUTT: NO, SIR.

THE COURT: ALL RIGHT. WE WILL PROCEED IN COURT AND SELECT THE JURY, AND THEN RECESS UNTIL AFTER LUNCH.

MR. DOYLE: THANK YOU.

THE COURT: WE WILL SEE YOU IN COURT IN ABOUT TWO MINUTES, GENTLEMEN.

MR. HONEYCUTT: ALL RIGHT, SIR.

MR. DOYLE: THANK YOU, JUDGE.

(PROCEEDINGS IN OPEN COURT, JURY PRESENT.)

THE COURT: MR. CHADDICK, WILL YOU TELL THOSE WHO ARE TO TAKE THEIR SEAT IN THE AUDIENCE?

THE MARSHAL: AS I CALL YOUR NAME AND NUMBER, WOULD YOU PLEASE HAVE A SEAT IN THE GALLERY? NUMBER THREE, WILLIE COMBS; NUMBER FIVE, WAVELLE DUGAS; NUMBER TWELVE, WILTON SIMMONS; NUMBER TWENTY-EIGHT, LAWRENCE PANIUSKI; NUMBER THIRTY-TWO, JOHN ASKEW; NUMBER FORTY-TWO, HAROLD HERFORD.

THE COURT: ALL RIGHT. DO YOU WANT TO SWEAR THEM, PLEASE?

(WHEREUPON THE JURY PANEL WAS DULY SWORN BY THE CLERK.)

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN. I WILL JUST BE VERY BRIEF WITH YOU NOW, BECAUSE WE ARE GOING TO LET YOU GO TO LUNCH. I SIMPLY WANT TO TELL YOU THAT I WILL ASK THAT YOU NOT SPEAK TO ANYONE ABOUT THE CASE. SPECIFICALLY, I AM GOING TO ASK THAT YOU NOT SPEAK TO ANY OF THE ATTORNEYS, OR ANY OF THE PARTIES IN THIS CASE. FOR AN

EXAMPLE, IF YOU MEET THEM IN THE HALL, DO NOT SAY GOOD MORNING, GOOD AFTERNOON, HELLO, OR GOOD-BYE. DON'T SPEAK TO THEM AT ALL. DON'T SAY A WORD TO THEM. AND I AM INSTRUCTING THEM NOT TO SAY ONE WORD TO YOU. SO I WANT YOU TO UNDERSTAND, FIRST OF ALL, OF COURSE, IF A LAWYER SEES YOU COMING, HE RECOGNIZES YOU AS A JUROR, AND HE MAY TURN HIS HEAD SO THAT HE DOESN'T HAVE TO BE CONFRONTED WITH THE SITUATION. I WANT YOU TO KNOW HE IS NOT TRYING TO BE RUDE TO YOU. HE IS CARRYING OUT MY INSTRUCTIONS BECAUSE HE CAN GET IN TROUBLE WITH ME IF HE VIOLATES THIS ORDER. SO THAT IS THE WAY WE ARE GOING TO OPERATE. SO WHEN YOU COME BACK FROM LUNCH, WE WILL THEN TELL YOU IN GREAT DETAIL WHAT YOU SHOULD OR SHOULDN'T DO. NOW, DO YOU ALL THINK YOU CAN BE BACK BY 1:30? ALL RIGHT. EVERYBODY BE BACK AT 1:30. NOW, HE WILL SHOW YOU THE JURY LOUNGE AREA WHERE YOU WILL REPORT WHEN YOU COME BACK. ALL RIGHT. THANK YOU. WE WILL SEE YOU AT 1:30.

(JURY EXCUSED.)

(PROCEEDINGS OUT OF THE PRESENCE OF THE JURY.)

THE COURT: DOES THE PLAINTIFF HAVE ANYTHING FURTHER TO COVER?

MR. DOYLE: NO, SIR, YOUR HONOR, NOT AT THIS TIME.

THE COURT: DEFENSE?

MR. HONEYCUTT: NOT AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT. COURT WILL BE IN RECESS

UNTIL 1:30 P.M.

(COURT RECESSED.)

AFTERNOON SESSION

(PROCEEDINGS OUT OF THE PRESENCE OF THE JURY.)

THE COURT: ALL RIGHT, GENTLEMEN. THE COURT HAS BEEN MULLING OVER THE QUESTION PRESENTED BY PLAINTIFF'S COUNSEL URGING THAT THE CASE OF BATSON VERSUS THE STATE OF KENTUCKY IS APPLICABLE IN THIS CASE. AND THAT ANY TIME THERE IS A BLACK DEFENDANT OR BLACK PLAINTIFF, THEN THE OPPOSING PARTY IN THE CIVIL OR CRIMINAL CASE, IN ORDER TO KNOCK A PERSON OF THE OPPOSING PARTY'S RACE OFF THE JURY, MUST ARTICULATE HIS REASONS SHOWING THEY ARE NONRACE RELATED. AM I CORRECT, MR. DOYLE?

MR. DOYLE: THAT IS A CORRECT STATEMENT, YOUR HONOR.

THE COURT: AND IN COUNSEL'S ARGUMENT TO THE COURT, HE ARGUED THAT THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES APPLIED, AS WELL AS THE FOURTEENTH AMENDMENT. AND CORRECT ME IF I AM IN ERROR, COUNSEL, BUT YOU SAID YOU COULD FIND NO CASE TO SUPPORT YOUR POSITION, THAT YOU WERE ENTITLED TO HAVE THE DEFENDANT IN THIS CASE ARTICULATE REASONS WHY HE PREEMPTORILY CHALLENGED TWO BLACKS TODAY.

MR. DOYLE: YOUR HONOR, SO THAT I MAKE CLEAR, IF YOUR HONOR PLEASE, FOR THE RECORD, WHAT I ARGUED WAS THAT

BATSON CONTAINED LANGUAGE, WHICH IN MY INTERPRETATION OF IT, ALLOWED FOR REASONABLE EXTENSION OF THE LAW INTO AN AREA THAT IT DOES NOT NOW EXIST. THERE ARE NO CIVIL CASES APPLYING BATSON OR ANY CASE LIKE IT. ON THE ISSUE OF ARTICULATION OF REASONS FOR PREEMPTORILY CHALLENGING OF JURORS, I DIDN'T MEAN TO GIVE THE COURT THE IMPRESSION THAT ANY TIME THERE WAS IN EXISTENCE ANY CIVIL CASE WITH A SIMILAR RULING.

THE COURT: YEAH.

MR. DOYLE: I AM SIMPLY ARGUING FOR THE GOOD FAITH EXTENSION OF BATSON TO CIVIL CASES.

THE COURT: ALL RIGHT. I AGREE WITH YOU, MR. DOYLE. AND THAT IS CORRECT. YOU DID TELL THE COURT YOU COULD FIND NO CASE, CIVIL CASE TO SUPPORT YOUR POSITION?

MR. DOYLE: THAT'S RIGHT, YOUR HONOR.

THE COURT: SO IF I INCORRECTLY STATED IT, I WANT TO CORRECT IT.

MR. DOYLE: NO, SIR. I JUST WANT TO MAKE IT CLEAR FOR THE RECORD. I DIDN'T WANT THE COURT TO CONCLUDE THAT I HAD NOT BEEN IN GOOD FAITH IN ARGUING.

THE COURT: ALL RIGHT. MR. HONEYCUTT, DID YOU WANT TO SAY ANYTHING BEFORE I GO FURTHER?

MR. HONEYCUTT: YOUR HONOR, OUR ARGUMENT SIMPLY IS THAT BATSON IS A CRIMINAL CASE. AND THE SIXTH AMENDMENT APPLIES TO RIGHTS AND CIRCUMSTANCES UNDER CRIMINAL LAW. AND THAT COUNSEL COULD NOT AND HAS NOT CITED ANY CIVIL AUTHORITY

AT ALL TO APPLY THAT CRIMINAL HOLDING TO A CIVIL MATTER SUCH AS THIS ONE.

THE COURT: ALL RIGHT. LET THE COURT GO AHEAD AND HOLD AT THIS TIME SO THAT HOPEFULLY WE CAN PROCEED WITH THE CASE. IN THE HISTORY OF PREEMPTORY CHALLENGES, IT HAS ALWAYS BEEN UNDERSTOOD IN BOTH CIVIL AND IN CRIMINAL CASES THAT A PARTY TO A LAWSUIT HAD THE RIGHT TO EXCUSE A CERTAIN NUMBER OF PEOPLE FROM THE JURY WITHOUT GIVING ANY REASONS THEREFOR. AND THAT HAS EXISTED, AS FAR AS I KNOW, SINCE THIS CONSTITUTION OF THE UNITED STATES WENT INTO EXISTENCE TWO HUNDRED YEARS AGO THIS YEAR, AND IN FACT, THIS MONTH. AND IT WAS ONLY RECENTLY THAT THE SUPREME COURT OF THE UNITED STATES WENT ON TO HOLD THAT IN A CRIMINAL CASE, IF THE PROSECUTION WERE TO CHALLENGE BLACK CITIZENS WHERE A BLACK DEFENDANT WAS THE DEFENDANT IN THE CASE, THAT THE STATE HAD TO ARTICULATE ITS LEGITIMATE REASONS, AND THEY HAVE TO BE OTHER THAN RACE AS A BASIS FOR EXERCISING ITS PREEMPTORY CHALLENGES. I HAVE READ THE BATSON CASE AND I DON'T, I AM UNABLE BY ANY STRETCH OF THE IMAGINATION TO STRETCH THE BATSON CASE TO APPLY TO A CIVIL CASE. AND SINCE I FIND NO LAW THAT SUPPORTS THAT POSITION, I MUST ACCEPT THE LAW AS IT EXISTS NOW, AND LEAVE THAT UP TO THE APPELLATE COURT OR THE SUPREME COURT OF THE UNITED STATES AS TO WHETHER TO CHANGE THE PREEMPTORY SYSTEM IN CIVIL JURY CASES. BUT AGAIN, FOR THE RECORD, SO THAT THE RECORD IS CLEAR SO THAT THE PARTIES IN THE EVENT THEY WANT

TO APPEAL, IN THE QUALIFYING OF EIGHTEEN JURORS IN ORDER TO PICK TWELVE OF THE EIGHTEEN QUALIFIED, THREE WERE OF THE BLACK RACE, THE SAME AS THE PLAINTIFF. THE PLAINTIFF CERTAINLY DID NOT CHALLENGE ANY OF THE BLACK JURORS. HE CHALLENGED NOTHING BUT WHITE JURORS. THE DEFENDANT CHALLENGED TWO OF THE THREE BLACK JURORS AND A WHITE JUROR. THE COURT FINDS THERE IS NO DISCRIMINATION, NO VIOLATION OF THE LAW IN THE SELECTION PROCEDURE. AND THE MOTION TO HAVE THE DEFENDANT ARTICULATE THE REASONS WHY HE CHALLENGED THE TWO BLACK JURORS IS DENIED. I MAKE THIS ON THE RECORD SO THAT IN THE EVENT OF AN APPEAL, THE RECORD WILL BE CLEAR AS TO THE COURT'S RULING. AND BEFORE WE FINISH THIS ISSUE, MR. DOYLE, I AM GOING TO GIVE YOU AN OPPORTUNITY TO ADD ANY AND EVERYTHING ELSE YOU WANT ON THE RECORD. MR. HONEYCUTT, I WILL LET YOU ADD ANYTHING ELSE YOU WANT, THEN I WILL EVEN LET MR. DOYLE COME BACK AND ADD SOME MORE SO THAT YOU HAVE YOUR FULL OPPORTUNITY. SO WHY DON'T YOU COME UP TO THE PODIUM AND MAKE ANY FURTHER ARGUMENT YOU WISH. AND I AM NOT GOING TO INTERRUPT YOU. AND I AM NOT GOING TO SAY ANOTHER WORD ABOUT THE ISSUE.

MR. DOYLE: THANK YOU, JUDGE. THE ONLY OTHER ADDITIONAL ARGUMENT I WOULD, OR NOT ARGUMENT, BUT POINT I WOULD LIKE TO MAKE FOR THE RECORD IS UPON RECEIVING THE CORRECTION FROM THE COURT AS TO THE PROPER AMENDMENT WHICH APPLIES TO CIVIL JURIES, MY ARGUMENT IS THAT THE SEVENTH

AMENDMENT GIVES A RIGHT TO A CIVIL JURY, AND THAT THAT RIGHT TO A JURY PRESUPPOSES THE SAME KIND OF JURY, FREE FROM PREJUDICE, THAT BATSON MENTIONS. AND THAT IS THE ONLY ADDITION I WOULD MAKE, YOUR HONOR.

THE COURT: ADD ANYTHING ELSE YOU WANT, MR. DOYLE.

MR. DOYLE: THAT'S ALL I HAVE GOT TO SAY, JUDGE.

THE COURT: PLEASE, PLEASE, NOW IS YOUR TIME.

MR. DOYLE: I AM THROUGH, JUDGE.

THE COURT: ALL RIGHT. MR. HONEYCUTT, DO YOU WANT TO ADD ANYTHING ELSE, SIR?

MR. HONEYCUTT: YES, SIR. JUST TO MAKE WHAT I HOPE WILL BE A SUMMARY, AND A CONCISE STATEMENT, WHICH IS REALLY SORT OF A REHASHING OF WHAT I HAVE ALREADY SAID, THE CASE RELIED UPON BY THE PLAINTIFF'S COUNSEL, BATSON VERSUS KENTUCKY, WAS A CRIMINAL CASE. IT WAS NOT A CIVIL CASE. THIS IS A CIVIL PROCEEDING. THE AMENDMENT RELIED UPON BY PLAINTIFF'S COUNSEL ESSENTIALLY WAS THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH IS AN AMENDMENT CITED THAT RELATES TO CIRCUMSTANCES REGARDING CRIMINAL RIGHTS AND CRIMINAL LAW. COUNSEL, BY HIS OWN ADMISSION, HAS NOT AND CANNOT CITE A SINGLE CIVIL AUTHORITY IN SUPPORT OF HIS POSITION, THAT I, AS COUNSEL FOR THE DEFENDANT, ARTICULATE REASONS FOR HAVING CHALLENGED TWO OF THE THREE, PREEMPTORILY HAVING CHALLENGED TWO OF THE THREE BLACK MEMBERS OF THE JURY

PANEL. AS AN ASIDE, I WOULD NOTE THAT BOTH PLAINTIFF AND DEFENDANT WERE ACCORDED THREE CHALLENGES. THERE WERE THREE BLACKS. AND IF IT WERE DISCRIMINATORY ACTION, THE THREE, MY THREE CHALLENGES COULD HAVE BEEN ASSERTED AGAINST THE THREE BLACKS. THAT HAS NOTHING TO DO WITH THE MATTER. I SIMPLY THREW THAT IN AS AN ASIDE REMARK. BUT ESSENTIALLY, THE PLAINTIFF CAN CITE NO CIVIL AUTHORITY, BY HIS OWN ADMISSION, TO HAVE THE HOLDING IN BATSON APPLY TO ANY CIVIL PROCEEDING, THIS ONE INCLUDED. THANK YOU.

THE COURT: MR. DOYLE, COME ON UP, PLEASE, SIR.

MR. DOYLE: JUDGE, I HAVE NOTHING FURTHER.

THE COURT: PLEASE, IF YOU HAVE GOT SOMETHING ELSE, DON'T SIT DOWN, COUNSEL. COME UP AND SAY IT.

MR. DOYLE: JUDGE, I AM GOING TO SAVE MY BREATH. THANK YOU FOR THE OPPORTUNITY.

THE COURT: ALL RIGHT. NOW, DO WE HAVE ANOTHER RULING TO MAKE BEFORE WE GET STARTED?

(PROCEEDINGS DELETED.)

C E R T I F I C A T E

I, JOE D. WILLIAMS, OFFICIAL REPORTER, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, DO HEREBY CERTIFY THE ABOVE AND FOREGOING 63 PAGES OF TYPEWRITTEN MATTER CONSTITUTE A TRUE AND CORRECT COPY OF PROCEEDINGS HAD AT THE TIME AND PLACE AS HEREINBEFORE SET FORTH ON PAGE ONE HEREOF.

IN WITNESS WHEREOF, I HAVE HEREUNTO AFFIXED MY SIGNATURE AT LAKE CHARLES, LOUISIANA, THIS THE 13TH DAY OF JANUARY, 1988.

I FURTHER CERTIFY THAT THE TRANSCRIPT FEES AND FORMAT COMPLY WITH THOSE PRESCRIBED BY THE COURT AND JUDICIAL CONFERENCE OF THE UNITED STATES.

.....

JOE D. WILLIAMS

(3)

NO. 89-7743

In the
Supreme Court of the United States

OCTOBER TERM, 1990

THADDEUS DONALD EDMONSON
Petitioner

versus

LEESVILLE CONCRETE COMPANY, INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

PERCY, SMITH, FOOTE &
HONEYCUTT
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**Counsel of Record*

July 11, 1990

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

15pp

QUESTION PRESENTED

Whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986) governing the exercise of peremptory challenges by prosecutors in criminal cases should be extended to non-governmental litigants in civil jury trials?

LIST OF PARTIES

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Plaintiff-Petitioner

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Defendant-Respondent

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Basking Ridge, NJ 07920

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ARGUMENT

In urging this Court to extend *Batson v. Kentucky*, 476 U.S. 79 (1986) to civil jury trials, the petitioner begins with two incorrect factual assertions. First, he states: "No one has seriously contended in this litigation that Edmonson failed to meet the primary burden of proof espoused in *Batson*." Petition at 7. Second, he asserts: "The fact is, Edmonson's race was the determinative factor in Defendant excluding the two black jurors." *Id.* Both statements are clearly erroneous. Rather, the trial judge not only rejected plaintiff-petitioner's claim that *Batson* applies to civil jury trials, but also held no discrimination was involved in the exercise of the peremptory challenges. *Transcript*, vol. 3, p. 61. The judge never reached the issue of the defendant explaining his peremptories. It is absolutely false to assert that two of the three jurors struck by the defendant were due to race because the judge did not allow defendant-respondents, *who were prepared to do so*, to explain why two of the three venire persons struck by its peremptories happened to be black. The record simply does not support the plaintiff-petitioner's factual assertions. The issue has been and continues to be purely a legal one: Does *Batson v. Kentucky* apply to non-governmental litigants in civil jury trials?

I.

The respondent acknowledges what at least appears to be a direct conflict among the circuits on the issue presented by this case. Admittedly, the existence of such a "square and irreconcilable conflict [among the federal circuits] *ordinarily* should be enough to secure review." Stern, Gressman, and Shapiro, *Supreme Court Practice* 197 (6th ed., 1986) (emphasis in original). Nevertheless, in a number of situations presenting direct conflicts, this Court has

declined review. *Id.* For the reasons related below, respondent respectfully submits that this Court should decline review in this case.

Since *Batson v. Kentucky* ruled that ". . . the State's privilege to strike individual jurors through peremptory challenges[ ] is subject to the commands of the Equal Protection Clause," 476 U.S. at 89 (footnote omitted), three courts of appeal have ruled on the issue of whether *Batson* applies to civil litigants. In *Fludd v. Dykes*, 863 F.2d. 822 (11th Cir. 1989) *cert. denied*, 110 S.Ct. 201 (1989), a panel of the Eleventh Circuit held that "the policies underlying the Supreme Court's decision in *Batson* are equally applicable in the civil context." *Id.* at 828. In *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), a panel of the Eighth Circuit held that *Batson* applies to "governmental actors, without distinguishing criminal and civil legal proceedings." *Id.* at 1008 (footnote omitted). In the instant case, the Fifth Circuit sitting *en banc* ignored these two prior circuit court decisions and declined to extend *Batson* "into the civil area, where the considerations on which *Batson* is based are, if present at all, far weaker than in the criminal field." 895 F.2d. at 226.

Despite this apparent conflict, certain facts differentiate this case from the other two. Specifically, this case is the only one that involves the application of *Batson* against a party that truly is a private litigant. Both *Fludd* and *Reynolds* were civil rights cases under 42 U.S.C. § 1983 brought by black plaintiffs against law enforcement officials. *Reynolds* reflected this fact by confining its holding to "government actors." Although *Fludd* did not limit its holding in this way, it could well have done so. In the instant case, the Fifth Circuit avoided ruling on the application of *Batson* to civil rights cases and other civil cases involving state officials. The Court noted it had "no occasion

to consider the situation presented where the state appears as a civil litigant." 895 F.2d at 222, n. 10. The conflict, therefore, between the instant case and *Reynolds* is not as direct as might first appear. Thus, despite *Reynolds*, the Eighth Circuit in a future case could follow *Edmonson* in non-civil rights cases and the Fifth Circuit in civil rights cases could follow *Reynolds*. As to the conflict between the present case and *Fludd*, it is an unnecessary one. Given its facts, the Eleventh Circuit could well have limited its holding to "governmental actors."

The differences between the instant case and the two civil rights cases are significant on the issue of state action. Respondent submits that confusion about the relationship between the state-action doctrine and *Batson* suggests that the issue presented in this case is not ripe for decision by this Court. In *Batson*, this Court did not need to discuss state action because it was self-evident in criminal prosecution by the state. If this Court had discussed whether the rule it was announcing applied as well to defense counsel in criminal cases, then necessarily the case would have indicated something about the application of the state-action concept to other litigants and the trial court itself. In fact, *Batson* specifically left that very issue unanswered. ("We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." 476 U.S. at 89, n. 12). Of course, if this Court had decided whether defense counsel in a criminal case is a state actor, that decision would have offered a better indication of how the state-action issue in the case should be decided.

Without guidance from this Court, the Courts of Appeal in the three cases that have addressed *Batson's* applicability to civil trials have had to draw uncertain conclusions about the state-action doctrine. *Reynolds* found the

presence of a "governmental actor" sufficient to constitute state action, but declined to decide "whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action." 893 F.2d at 1008, n. 2. On the sufficiency of court involvement to constitute state action, the instant case reached a different conclusion from *Fludd*. Whereas *Fludd* found the trial judge's oversight of the peremptory process sufficient to make him or her a "discriminatory state actor under the equal protection clause," 863 F.2d at 828, the Fifth Circuit opinion in this case did not so conclude.

Before answering whether a trial court's involvement in the peremptory process constitutes state action, this Court should first decide whether the exercise by a criminal defense attorney of peremptory challenges constitutes state action. The answer to that question logically precedes the issue of *Batson's* application to private litigants in civil cases. For if the Court intends to use the Equal Protection Clause to reach defense challenges, it must confront and overrule or at least distinguish *Polk Co. v. Dodson*, 454 U.S. 312 (1981), and hold criminal defense attorneys to be state actors. If this Court were to do so, then the issue as to private attorneys in civil cases would be somewhat clarified. If *Batson*, however, is not applicable to criminal defense attorneys, then there would be no doubt about the correctness of the Fifth Circuit decision in this case. We suggest the fact that this Court had the opportunity in *Alabama v. Cox*, Sup. Ct. No. 88-630 *cert. denied*, 109 S.Ct. 817 (1989)[1] to decide this very issue but

1. In *Alabama v. Cox*, Sup. Ct. No. 88-630, the prosecution had unsuccessfully petitioned the Alabama Court of Criminal Appeals for a mandamus to a trial judge in order to prevent a white defendant accused of killing a black from exercising his peremptories to exclude blacks

did not, indicates the issue in this case is even less ripe for decision.

II.

In addition to the fact that the conflict among the circuits is not as clear as it might first appear, the correctness of the lower court's decision also suggests that the instant case is not appropriate for review by this Court. The opinion speaks well for itself in this regard. The respondent therefore focuses on this Court's decision in *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990), which provides additional authority for the correctness of the Fifth Circuit opinion in this case.

Holland held (1) that a white defendant in a criminal case has standing to raise a Sixth Amendment claim about exclusion of black veniremen by peremptory challenge but also held (2) that defendant was not entitled under the Sixth Amendment to a cross-section of the community in the petit jury. This Court specifically did *not* decide a related issue, namely, whether a white defendant has standing under the Equal Protection Clause to raise the claim that the state excluded black veniremen. The undecided standing issue, when addressed, will again raise the related issue of whether the petit jury is subject to the "fair-cross-section requirement." In *Holland*, this Court rejected a "fair-cross-section requirement" for the petit jury under the Sixth Amendment because a contrary decision would have meant elimination of peremptory challenges. If, however, the "fair-cross-section" standard were to be applied to the petit jury under the Equal Protection Clause, the same result rejected in *Holland* would nevertheless

(footnote 1 continued)
from the jury on the basis of race. 57 U.S.L.W. 3398.

come to pass. Presumably, a majority of this Court has concluded that the Constitution does not require elimination of peremptories. If so, then the Equal Protection Clause should not be made to apply to defense attorneys in criminal cases nor to private litigants in civil cases. For if it is so applied, the inevitable result will be a cross-section standard applied to the petit jury under the Equal Protection Clause and the elimination of peremptories.

This Court's choice in *Batson* of the Equal Protection rationale was apparently a deliberate choice to avoid the cross-section requirement of the Sixth Amendment. Batson had argued the Sixth Amendment, not the Equal Protection Clause. As Chief Justice Burger's dissent emphasized, the Court "granted certiorari to decide whether [Batson] was tried 'in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community.' " 476 U.S. at 112 (Burger, C.J., dissenting). At oral argument, Batson "expressly declined to raise" the Equal Protection claim. *Id.* (See excerpt from transcript. *Id.* at 113-15.) In choosing to rest the decision on a ground not argued, as Chief Justice Burger's dissent observed, "the Court depart[ed] dramatically from its normal procedure without any explanation." *Id.* at 115. This was especially peculiar because, as one commentator notes, "the Sixth Amendment approach seems more consistent with the rationale of *Batson*, which turned on the effects of exclusion on those jurors being removed, rather than the effects of exclusion on the defendant's trial." Pizzi, "*Batson v. Kentucky:* Curing the Disease but Killing the Patient," 1987 *Sup. Ct. Rev.* 97, at 117 (hereinafter Pizzi).

Had *Batson* been decided on Sixth Amendment grounds, the case most assuredly would have been applicable also to defense counsel in a criminal case. The

Sixth Amendment involves no "state action" hurdle. As the Fifth Circuit observed in "*United States v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986), *vacated*, 107 S.Ct. 1267 (1987), "every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be prohibited." Inevitably, as pointed out in *Holland*, a decision that the petit jury is subject to the fair cross-section requirement would mean judicial regulation of the racial mix in the jury. Under the Sixth Amendment cases the party claiming a violation of the amendment need not be of the same race as the excluded juror. *Duren v. Missouri*, 439 U.S. 357, 359, n. 1 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972). *Holland v. Illinois*, *supra*. This is consistent with the Sixth Amendment's cross-section standard, which has evolved into a requirement for the jury venire to reflect a near mirror-imaging of the racial composition in the community from which the potential jurors are drawn. Extension of this mirror-imaging to the petit jury has thus far been prevented, at least under the Sixth Amendment, by the second holding in *Holland*.

This Court has repeatedly rejected this idea of the petit jury mirroring the racial composition of the community. Five days after avoiding the Sixth Amendment issue in *Batson*, *Lockhart v. McCree*, 476 U.S. 162 (1986), held that the Constitution does not prohibit states from "death qualifying" juries in capital cases. The Court distinguished between the jury venire, to which the cross-section standard applies, and the petit jury, which is not subject to the cross-section standard:

> We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or

peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren v. Missouri*, 439 U.S. 357, 363-364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02, 42 L.Ed. 2d 690 (1975). ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population"); *cf. Batson v. Kentucky*, ___ U.S. ___, ___, n. 4, 106 S.Ct. 1712, 1716, n. 4, 89 L.Ed.2d ___ (1986) (expressly declining to address "fair-cross-section" challenge to discriminatory use of peremptory challenges). The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury. . .

476 U.S. at 173-74 (footnote omitted.)

This quotation, which was repeated in *Holland*, points up the tension within *Batson*. *Batson* reaffirms that petit juries are not required to approach a mirror-image of the community (". . . we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population,' " 476 U.S. at 85, n. 6.) Yet some of *Batson's* language, taken to logical extremes, would produce just that result. By relying on the Equal Protection Clause and the requirement of purposeful discrimination, *Batson* apparently attempts to avoid such a consequence. One commentator has observed that "[t]he Court's decision to steer clear of the Sixth Amendment and the fair cross-section theory was no doubt heavily influenced by the fact that, at the time *Batson* was under consideration, it was wrestling with *Lockhart v. McCree*, 106

S.Ct. 1758 (1986) . . ." Pizzi at 121. *Holland* has reaffirmed this view expressed in *Lockhart* and, by implication, the limited scope of *Batson*.

III.

The issue presented in this case is an important one, but before it is ripe for ultimate decision by this Court, other issues remain to be decided. The key preliminary issue is the application of *Batson* to defense attorneys in criminal cases. Resolution of that issue will shape the state-action doctrine in regard to the peremptory process. Addressing that issue will also allow this Court to consider whether it wishes to do indirectly what it has declined to do directly, namely, to apply the cross-section requirements of the Sixth Amendment through the Equal Protection Clause to the petit jury. In the meantime, no harm is done by declining review in this case because the Court of Appeals for the Fifth Circuit, *en banc*, decided this case correctly.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent,
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*Counsel of Record**

July 11, 1990

No. 89-7743

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THADDEUS DONALD EDMONSON,
Petitioner

v.

LEESVILLE CONCRETE COMPANY, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 30, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

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06-26-87	PT STMT
07-27-87	Motion by Defendant filed to quash the taking of depositions
07-27-87 to 08-05-87	Jury Trial
09-28-87	JUDGMENT—together w/legal interest from date of judicial demand
10-29-87	NOTICE OF APPEAL filed

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. CV84-2871

THADDEUS DONALD EDMONSON,

vs.

LEESVILLE CONCRETE COMPANY, INC.

COMPLAINT FOR DAMAGES

The Complaint of THADDEUS DONALD EDMONSON, a citizen of the State of Louisiana, with respect represents:

1.

Jurisdiction is founded upon the occurrence of the subject accident on an area within the confines of Fort Polk, a Federal area or enclave, based on jurisdiction under Title 28 USCA Sec. 1331 and on the grounds that every United States District Court is a Court of general original jurisdiction in respect to cases and controversies arising within federal areas or federal reservations that are geographically located within the district for which the Court sits.

2.

Defendant in this case is the LEESVILLE CONCRETE COMPANY, INC., a domestic corporation, authorized to do and doing business in the State of Louisiana, who can be served through its registered agent for service of process, R. B. Sewell or Geneva Sewell, South Texas Street, DeRidder, Louisiana.

3.

Defendant, LEESVILLE CONCRETE COMPANY, INC., is justly and truly indebted onto the complainant, THADDEUS DONALD EDMONSON, in the full and true sum of FOUR HUNDRED TWENTY THOUSAND and NO/100 ($420,000.00) DOLLARS, together with legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings for the reasons set out below:

4.

That on June 18, 1984, complainant was injured while working as an employee of Tanner Heavy Equipment Company, Inc. at a location on a job site at Fort Polk, Vernon, Louisiana. Complainant was assisting with the filling of a hopper or curb machine with concrete which required that complainant guide the concrete chute from defendant's vehicle to the hopper.

5.

At the time of the accident on June 18, 1984 at approximately 7:00 P.M., the defendant's concrete truck had completed loading the hopper and was in the process of pulling forward when the operator of the truck, an employee of defendant, permitted the concrete truck to roll backwards toward complainant, pinning complainant between the rear bumper of the truck and the chute on the hopper or curb machine.

6.

The accident described herein was the sole result of the carelessness and negligence of the defendant, through its employee, in permitting the concrete truck owned by defendant to roll backwards pinning the complainant between the rear bumper of the truck and the chute on the hopper or curb machine.

7.

Complainant avers that defendant, through the conduct of its employee, was negligent and at fault in the following non-exclusive list of particulars, among others which may be shown at the trial hereof, to-wit:

(a) Careless and negligent operation of its vehicle;

(b) Failure to properly maintain its vehicle;

(c) Failing to maintain control of its vehicle;

(d) Failing to assure that its vehicle would not roll backwards causing injury to complainant.

8.

Complainant, THADDEUS DONALD EDMONSON, itemizes the damages for which he has sustained and is entitled to recover as follows:

(a) Medical expenses, past, present and future	$ 20,000.00
(b) Pain and suffering, past, present and future	$100,000.00
(c) Disability and loss of income and impairment of earning capacity	$200,000.00
(d) Mental anguish, past, present and future	$100,000.00

Defendant herein is liable onto complainant in the full and true sum of FOUR HUNDRED TWENTY THOUSAND and NO/100 ($420,000.00) DOLLARS.

9.

Complainant desires a trial by jury on all issues raised herein and hereby expressly reserves the right to amend the Complaint in accordance with the law.

WHEREFORE, complainant prays for service and citation upon defendant herein and further prays that after expiration of all legal delays and other due pro-

ceedings had, that there be judgment entered herein in favor of complainant, THADDEUS DONALD EDMONSON, and against defendant, LEESVILLE CONCRETE COMPANY, INC., in the full and true sum of FOUR HUNDRED TWENTY THOUSAND AND NO/100 ($420,000.00) DOLLARS together with legal interest thereon from date of judicial demand until paid, and for all costs of these proceedings.

Complainant further prays for a trial by jury on all issues raised herein.

Respectfully submitted,

WOODLEY, BARNETT, COX,
WILLIAMS, FENET & PALMER

/s/ James E. Williams
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Lake Charles, LA 70602
(318) 433-6328

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

[Title Omitted in Printing]

ANSWER

NOW INTO COURT, through undersigned counsel, comes LEESVILLE CONCRETE COMPANY, INC., named defendant in the above numbered and entitled cause, and for answer to the complaint of the plaintiff with respect shows the Court that:

I.

FIRST DEFENSE

1.

The petition or complaint fails to state a cause of action upon which relief may be granted.

II.

SECOND DEFENSE

In response to the specific allegations of the complaint, defendant shows:

1.

The allegations of Paragraph 1 are denied.

2.

The allegations of Paragraph 2 are admitted.

3.

The allegations of Paragraph 3 are denied.

4.

The allegations of Paragraph 4 are denied.

5.

The allegations of Paragraph 5 are denied as written.

6.

The allegations of Paragraph 6 are denied.

7.

The allegations of Paragraph 7 are denied.

8.

The allegations of Paragraph 8 are denied.

9.

The allegations of Paragraph 9 are admitted.

III.

THIRD DEFENSE

1.

In the alternative, and only in the event this Honorable Court should find any fault or negligence on the part of defendant or its employees which is denied, defendant shows that plaintiff was guilty of assumption of the risk which bars his recovery herein.

IV.

FOURTH DEFENSE

1.

In the further alternative, and only in the event this Honorable Court should find that defendant was guilty of any fault or negligence, which is denied, defendant shows that plaintiff was guilty of contributory negligence which

would serve to reduce the amount of any award by the percentage of his contributory negligence or fault.

WHEREFORE, defendant, LEESVILLE CONCRETE COMPANY, INC., prays that after due proceedings are had and trial hereof, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands at his cost;

Further prays for trial by jury of all issues herein.

Respectfully submitted,

TRIMBLE, PERCY, SMITH, WILSON,
FOOTE, WALKER & HONEYCUTT

/s/ James T. Trimble
JAMES T. TRIMBLE, JR.
P. O. Box 1950
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Attorneys for Defendants

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

[Title Omitted in Printing]

PRE-TRIAL STATEMENT

Counsel for plaintiff, Thaddeus Donald Edmonson, submits the following pre-trial statement to the court and opposing counsel:

1. *Jurisdiction*

Jurisdiction in this case is founded upon the occurrence of the subject accident on an area within the confines of Fort Polk, a federal area or enclave, based on jurisdiction under Title 28 USCA, Section 1331, and on the grounds that under the U.S. Constitution, Article 1, Section 8, Clause 17, every U.S. District Court has exclusive jurisdiction in respect to cases and controversies arising within federal areas or federal reservations that are geographically located within the district for which the court sits.

2. *Additional Pleadings*

None.

3. *Pending Motions*

None.

4. *Brief Summary of the Case*

After being honorably discharged from the Army, Thaddeus Donald Edmonson began temporary work as a laborer for Tanner Heavy Equipment. This accident occurred after only two weeks on the job. On June 18, 1984, while working at a job site at Fort Polk, Vernon,

Louisiana, Mr. Edmonson was assisting with the operation of a curb machine, necessitating his position between defendant's concrete truck and the curb machine. As defendant's truck was in the process of pulling forward, the truck was permitted to roll backwards, suddenly pinning Edmonson between the rear bumper of the truck and the curb machine.

As a result of this accident, Edmonson sustained serious back and neck injuries that have necessitated substantial medical expenses.

5. *Issues of Fact*

The principal issues of fact involving the plaintiff, Thaddeus Donald Edmonson, are the following:

(a) Factual issues concerning the occurrence of the accident;

(b) Factual issues concerning plaintiff's injuries and their relationship to this accident.

(c) Factual issues concerning damages, including medical expenses, lost wages and general damages;

(d) Factual issues concerning physical and mental condition before and after the accident.

6. *Issues of Law*

(a) Legal Responsibility of Leesville Concrete Company for actions or omissions;

(b) Entitlement of complainant, including damages, special damages and legal interest.

7. *List of Witnesses*

Will Call:

(a) Fred Bolgiano, on cross-examination;

(b) William D. Sines;

(c) Eugene Brickhouse, videotape deposition;

(d) Bruce E. Razza, M.D., videotape deposition;

(e) Charles O. Bettinger, III, Ph.D.;

(f) William Krooss, M.D., videotape deposition;

(g) Mrs. Crystal Edmonson;

(h) Charles Schiber, M.S., videotape deposition;

(i) Dr. Clark Gunderson;

(j) Gillis Morin, M.D.;

(k) Rick Tanner.

May Call:

(a) Gary M. Woodard;

(b) Mark A. Stevens;

(d) Bennie Ash

(e) Earl Ray Connelly;

(f) Kenneth Gordon;

(g) Dan Elliott

(h) Gary Wright, on cross-examination;

(i) Rick Johnson, on cross-examination;

(j) James Massey, on cross-examination.

7. *Exhibits*

(a) Military records and Army Yearbook;

(b) Tax information and earnings records;

(c) Medical records and bills;

(d) Notice of cancellation of insurance;

(e) Military awards;

(f) Safety manual;

(g) Photographs;

(h) Receipts for travel expenses;

(i) Arrest and conviction records of Fred Bolgiano;

(j) Military Investigation of Accident;

(k) Emergency Room Record;

(l) Deposition by written questions to Physicians and Hospitals;

(m) Hospital Records;

(n) Receipts for Discovery matters for costs;

(o) Military Police Report;

(p) Certificate that Fort Polk is within the State of Louisiana.

8. *Depositions*

Deposition of any party taken if he is not in attendance at the trial of the case; depositions by written questions.

9. *Stipulations*

None have been presented.

10. *Probable Length of Trial*

Four to five days.

Date: June 25 '87

Respectfully submitted,

WOODLEY, BARNETT, WILLIAMS,
FENET, PALMER & PITRE

/s/ James E. Williams
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[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted in Printing)

PORTION OF PROCEEDINGS
HAD BEFORE THE HONORABLE EARL E. VERON,
UNITED STATES DISTRICT JUDGE, AND A JURY,
AT LAKE CHARLES, LOUISIANA, BEGINNING
ON THE 27TH DAY OF JULY, 1987.

* * * *

THE COURT: Good morning, ladies and gentlemen. All right. Let me apologize to you for coming in a little late. We were taking care of business. That is still no reason why we shouldn't have been here. And we are going to try to make it up to you. Now, we are going to be trying one case, and one case only. If you are not picked as a juror in that case, you will be free to go home. Additionally, if you are picked as a juror in this case, we are not going to keep you overnight. You can go home for lunch. I will tell you when to go home this evening, and tell you when to come back tomorrow and so forth and so on. The only time you will be required to stay here, other than when court is in session, is when the case is given to you. Now, Mrs. Benoit, would you swear all the prospective jurors?

(Whereupon all prospective jurors were duly sworn on voir dire.)

THE COURT: All right. Now, ladies and gentlemen, I will now state to you the statutory requirements that you must have in order to serve as a juror. At the conclusion, if you lack any one or more or these qualifications, I then ask you to raise your hand. You must be a citizen

of the United States, and you must have resided in the Lake Charles Division of the United States District Court, for the Western District of Louisiana, for the preceding twelve months. The Lake Charles Division comprises the following parishes, Calcasieu, Cameron, Jefferson Davis, Beauregard, Allen and Vernon. If you have lived in that six parish geographical area, although you may have moved from one parish to another, you would be qualified. You must be eighteen years of age or older, and you must be able to read, write and speak the English language. You must not be incapable of serving as a juror because of a mental or physical infirmity. Now, let me explain those to you. By mental infirmity we could mean, for example, that you have a nervous condition, that if you were sitting in the jury box, you couldn't give this case your undivided attention. A physical infirmity could be one where you have a hearing problem. If you can't hear all the evidence, it logically follows that you would not be able to render a fair decision. And the last thing, you must not have a charge pending against you, or have been convicted of a crime punishable by imprisonment for more than one year, and your civil rights have not be restored. Now, those are the statutory qualifications. Do any of you lack any one or more of these qualifications? If you do, please raise your hand. Seeing no hands, I will assume that you are all qualified at this point. Now, Mr. Chaddick, would you now draw eighteen names, please.

And, Mr. Alexander, starting putting them on the back row seats. Fill up the back and front, and we will put the rest on the seats inside the rail.

THE MARSHAL: As I call your name, come forward and have a seat. Number 41, Rodney Gaspard. Number 2, Ron Bradley. Number sixteen, Ara Eloi.

MS. ELOI: Eloi.

THE COURT: How is that spelled, ma'am?

MS. ELOI: E-l-o-i.

THE COURT: And it is pronounced how?

MS. ELOI: Eloi.

THE COURT: Eloi. All right, Thank you, ma'am.

THE MARSHAL: Number twenty, Gladys Hansbrough. Number three, Willie Combs. Number twelve, Wilton Simmons. Number fifteen, Robert Dougherty. Number Twenty-eight, Lawrence Paniuski. Number twenty-three, Nikki Fruge. Number Twenty-seven, Charles Williams. Number Thirty-seven, Eloise McBride. Number six, Phillip Soileau. Number five, Wavelle Dugas. Number nine, Roberta Yellott. Number eighteen, Ray Smith. Number forty-three, James Albarado. Number twenty-nine, John White. Number thirty-two, John Askew. That's eighteen, Your Honor.

THE COURT: All right. Ladies and gentlemen, the case you will be hearing is the case of Thaddeus Donald Edmonson versus Leesville Concrete Company, Incorporated. And by the way, let me explain to you, because I have found out that some people don't understand who the plaintiff and who the defendants are. So I am going to tell you. The plaintiff is the person bringing the lawsuit. So Mr. Edmonson is the plaintiff. Now, Mr. Edmonson, would you stand and face the jury please? All Right. Thank you, sir. You may be seated. Mr. Edmonson has alleged that on or about June 18, 1984, that while involved with a concrete truck that had been completed unloading, he was injured as a result of the concrete truck rolling backwards. And as a result of it, he is contending that he has suffered the injuries which is the subject of this lawsuit. Now, at this time I will ask, do any of you know Mr. Thaddeus Donald Edmonson, the plaintiff in this case? Now, representing Mr. Edmonson is Mr. James Doyle. Would you stand, please?

MR. DOYLE: Yes, sir.

THE COURT: Also representing Mr. Edmonson is Mr. Joe Morgan, Jr. Now, first of all, I ask do any of you know Mr. James Doyle? All right, Mrs. Yellott.

JUROR YELLOTT: Yes, sir.

THE COURT: How do you know him?

JUROR YELLOTT: He attended our church for sometime.

THE COURT: All right. Would you be seated, gentlemen. He attended your church for sometime?

JUROR YELLOTT: Yes, sir.

THE COURT: Does he still attend your church?

JUROR YELLOT: I don't think so. I haven't seen him in a while.

THE COURT: All right. Well, maybe he is going to another one, and that is probably why you are not seeing him. He may be going to the same denomination, but a different church. But what we are concerned with, and I want all of the jurors to understand that what the court is looking for, and what the attorneys and parties are looking for, is a jury that will listen to the evidence, determine the facts from the evidence and render a fair and impartial decision. And that is the purpose of these questions, to find out if there is something that would lead us to believe, or them to believe that maybe something would happen. Now, did you socialize with Mr. Doyle and his family, ma'am?

JUROR YELLOTT: No. sir.

THE COURT: All right. Well, I am just going to go straight to the direct question. Would the fact that he attended the same church you attended, would that, in anyway, influence your decision in this case?

JUROR YELLOTT: No.

THE COURT: See, what I am thinking about now is that if you are selected and sworn as a juror, and you get in the jury lounge area, instead of discussing the evidence, in the back of your mind, you say, well, you know, Mr. Doyle went to my church. He is a real nice fellow. And by the way, he is. I wouldn't want that to influence your decision, in anyway. On the other hand, from that fact that he attended your church, maybe you concluded maybe he is not such a nice fellow, and on the other hand, I wouldn't want you to conclude, well, I don't like him, therefore I am not going to be fair to the plaintiff.

Do you understand my question? And can you tell this court, under oath, that if you are selected and sworn as a juror, you can render a fair and impartial decision?

JUROR YELLOTT: Yes, sir.

THE COURT: Anyone else know Mr. Doyle? How about Mr. Morgan? Thank you, Mr. Morgan. All right. Now, Mr. Doyle, I am going to just ask you to name off, or read off the list of your partners and associates, and ask the jurors to listen to those names.

MR. DOYLE: Yes, sir.

THE COURT: And then I want to ask you if you know any of them.

MR. DOYLE: Judge, my partners are Edmond E. Woodley, Edgar F. Barnett, James E. Williams, Robert W. Fenet, Paul E. Palmer, Earl G. Pitre, or Pitre, some people call him Pitre, Clayton A. L. Davis, Rick J. Norman, and our associates are Henry E. Yoes, known as Gene Yoes, Kathleen Kay and Mr. Morgan here.

THE COURT: Do any of you know any of these other names? All right. Again, Ms. Yellott.

JUROR YELLOTT: Mr. Fenet. His children and my children go to school together, and are good friends.

THE COURT: All right. Would the fact, would that influence you, in anyway?

JUROR YELLOTT: No.

THE COURT: Or would you do what I said you should do?

JUROR YELLOTT: Would do what I should do? Yes, sir.

THE COURT: In other words, simply discuss the evidence and determine the facts from the evidence and take the law as I give it to you and render a verdict?

JUROR YELLOTT: Yes, sir.

THE COURT: All right. Let's see. Mr. Askew.

JUROR ASKEW: Yes, sir. I know Mr. Fenet fairly well, socially, he and his family.

THE COURT: Well, the fact that you know Mr. Fenet socially, would that influence your decision in this case?

JUROR ASKEW: No, sir.

THE COURT: If it would, tell us now.

JUROR ASKEW: No, sir, it won't.

THE COURT: All right. I believe you, sir. Anyone else know any of these gentlemen. All right. All right, Mr. Gaspard.

JUROR GASPARD: Woodley, Ed Woodley.

THE COURT: You know Mr. Woodley?

JUROR GASPARD: Yes, sir.

THE COURT: I am sure you have run across him socially.

JUROR GASPARD: Yes. And Fenet.

THE COURT: Yes. Would the fact that you have run across them socially, would that influence you, in anyway?

JUROR GASPARD: No.

THE COURT: Thank you. The reason why we are asking these questions is because after the case is over, if you ran across one of the attorneys—

(Note: At which point fire alarm sounded.)

THE COURT: All right. Back on the record, Mr. Williams, now. All right. Now, as I was telling you, ladies and gentlemen, the purpose of these questions is that, for example, after the case is over, if you happen to meet with one of these lawyers, would you be embarrassed because of running into them because of your verdict. That is what we are really after. So if it would create a situation where you would be embarrassed in running across, for example, Mr. Gaspard, if you ran across Mr. Fenet or Mr. Woodley later on, would you feel like, well, you know, his law firm represented that fellow, and I am kind of embarrassed about it. That is what we are talking about. And I know you are telling me that that won't affect you. All right. Now, representing the defendant

in this case, Leesville Concrete Company, is Mr. John Honeycutt. And let me ask this, ladies and gentlemen. Do any of you know Mr. Honeycutt? All right. Mr. Honeycutt, would you name off your partners and associates, sir?

MR. HONEYCUTT: My partners are Mr. J. Michael Percy, Mr. David P. Smith, Ms. Elizabeth E. Foote and, of course, myself. Our associates are Steven Graalman and Gary Nunn and Arron Moriarty.

THE COURT: All right. Do any of you know any of those people that he has mentioned? Now, the young lady sitting there, who is she?

MR. HONEYCUTT: This is Sandra Smith. She is a paralegal with our firm.

THE COURT: All right.

MR. HONEYCUTT: I might add, Judge, that our firm is located in Alexandria.

THE COURT: All right. Fine. Now, that we have explained what the case is about, and the parties involved, let me ask you a few more questions. Have any of you ever served on a jury before? Okay. Start with Mr. Gaspard. Was it civil or criminal? Do you recall?

JUROR GASPARD: Civil.

THE COURT: And where was it, state or federal court?

JUROR GASPARD: I would say state.

THE COURT: Yeah. Down the street?

JUROR GASPARD: Yeah.

THE COURT: And do you remember how it came out? If you do, it is fine; if you don't, fine.

JUROR GASPARD: It's been a long time ago.

THE COURT: All right. Mr. Bradley?

JUROR BRADLEY: Yes, sir. Civil.

THE COURT: And where, sir?

JUROR BRADLEY: It was here, federal.

THE COURT: Do you remember how it came out?

JUROR BRADLEY: A little bit.

THE COURT: Did the jury bring a verdict for the plaintiff or the defendant, or do you recall?

JUROR BRADLEY: Plaintiff.

THE COURT: Okay. Ms. Eloi, did you raise your hand?

JUROR ELOI: No.

THE COURT: All right. Who else on the back row? All right. Let's get to the front row then. All right, Mr. Paniuski?

JUROR PANIUSKI: Your Honor, I don't remember. It was a few months ago here in federal.

THE COURT: Was it me or Judge Hunter?

JUROR PANIUSKI: It was you.

THE COURT: What kind of case was it? Do you remember?

JUROR PANIUSKI: Assault and battery, I believe it was. We had a civil case. It was the Coushatta Reservation.

THE COURT: Oh, yes. That was a criminal case.

JUROR PANIUSKI: Criminal, yeah. With a weapon.

THE COURT: And you all found him what? Guilty?

JUROR PANIUSKI: Guilty

THE COURT: That's right. I remember now. All right. Let's see. Mr. Williams, did you raise your hand? I mean Ms. McBride, you raised your hand?

JUROR McBRIDE: Yes Here, last year. But it was settled out of court. We were dismissed.

THE COURT: So you didn't get to render a verdict?

JUROR McBRIDE: Right.

THE COURT: Mr. Soileau?

JUROR SOILEAU: I have been on four juries.

THE COURT: All right.

JUROR SOILEAU: Criminal and civil. But only one went to, we actually deliberated. And that was a criminal. And we ended up in a hung jury.

THE COURT: All right.

JUROR SOILEAU: So I haven't settled anybody anything.

THE COURT: What kind of case was it?

JUROR SOILEAU: One was—

THE COURT: No. The one you hung up.

JUROR SOILEAU: We deliberated, was on a drug case, undercover work.

THE COURT: Okay. Anybody else on the front row? All right, Mr. Dugas?

JUROR DUGAS: It was a civil case. And it ended for the defendant.

THE COURT: Was it here or in state court?

JUROR DUGAS: Here in district.

THE COURT: How long ago? Do you remember?

JUROR DUGAS: About four years ago.

THE COURT: All right, Ms. Yellott?

JUROR YELLOTT: It was a criminal case last summer, the same jury that the first gentleman served on, the Indian.

THE COURT: You were here then? You know, it is amazing, I have got to tell you this. I run into people who say, oh, Judge, I would like to serve on the jury in federal court. I say I don't have anything to do with it. It is all computer. And then I have got people that they call two and three times, and say I don't want to serve. And I say I don't have anything to do with it. It's picked by random. All right. On the back row. All right, Mr. Albarado?

JUROR ALBARADO: Yes, sir. I served on a civil case in Cameron with Judge Ward Fontenot.

THE COURT: Yes, sir.

JUROR ALBARADO: It was an attempted rape case. And really wasn't very solid evidence or anything. And we just went through the motions, and had a hung jury. And I don't think it's ever come up again.

THE COURT: All right. And Mr. Askew.

JUROR ASKEW: Yes, sir. I served on Special Court Martial Board when I was in the military.

THE COURT: All right. Fine. Now, ladies and gentlemen, the next question I am going to ask you, but

before I ask it, I want to tell you, if your answer is yes, you have not done anything wrong. The question is, has anyone attempted to contact you, or any member of your immediate family concerning this case. Now, you see why I said if that has happened, you did not do anything wrong. But it is essential that we know. So I take it nobody has been attempted to be contacted by anyone. All right. Now, I am going to talk about you and members of your immediate family. So I will define immediate family. That is your parents, your spouse, your children and your brothers and sisters. Now, have any of you or any member of your immediate family ever filed a lawsuit or claim as a result of an accident? If you have, please raise your hand. All right. No one has.

JUROR PANIUSKI: What do you mean, an accident? Well, I would say it happened, I don't remember, it's been eight, maybe ten years ago, I guess I would say roughly somewhere in there, where my daughter had worked for Pizza Hut, and what they did was put a Co_2 tank in the trunk of my automobile. And what happened, when she turned off of Ryan to come down Prien Lake to deliver over on Highway 14, and when she turned, the tank wasn't secured. So in other words, what happened, it rolled. And when it hit the corner of the trunk, it popped the valve and accidently took and put her to sleep. And she hit the, which is Community Coffee Place, over there on Prien Lake Road there. The case that was filed.

THE COURT: Did she file a suit or claim as a result of that?

JUROR PANIUSKI: Well, she filed a suit which was settled, I believe.

THE COURT: Yes.

JUROR PANIUSKI: Was settled out of court.

THE COURT: That is what I am asking.

JUROR PANIUSKI: Yeah.

THE COURT: In other words, she did file a suit or claim as a result of an accident?

JUROR PANIUSKI: Yeah.

THE COURT: All right. Okay. Mr. White?

JUROR WHITE: My dad filed suit because of an accident going to Lafayette. It has been maybe a year ago, a year or so ago, because of an accident.

THE COURT: And suit was filed where? In Lafayette?

JUROR WHITE: No, sir. I believe it's filed either in Lafayette or Baton Rouge.

THE COURT: Has it been resolved yet?

JUROR WHITE: Yes, sir.

THE COURT: All right. The fact that your daddy was involved in a suit, and this is also for you, Mr. Paniuski, would that, in anyway, influence your decision in this case?

JUROR PANIUSKI: No, sir.

JUROR WHITE: No, sir, Your Honor.

THE COURT: Anyone else? Now, we are going to just flip the coin over on the other side. Have any of you or any members of your immediate family ever have a suit or claim filed against you? All right, Mr. Williams. Let's see am I getting this right?

JUROR WILLIAMS: Yes, sir.

THE COURT: All right. You are Mr. Williams. What was it about, sir?

JUROR WILLIAMS: I have a suit pending now against me. I am a contractor. A man worked for another man on a project I had finished, is suing me for eight hundred and fifty thousand dollars.

THE COURT: Give me that again, now, so I can understand. You are a contractor?

JUROR WILLIAMS: Yes, sir. I am a general contractor.

THE COURT: All right. A man working for you—

JUROR WILLIAMS: No. This man never worked for me, period. He was working for a contractor that was picking up salvage timber on a road right of way that I had cleared and built previously.

THE COURT: Uh-huh.

JUROR WILLIAMS: And he claimed to have a back injury. So he has a lawsuit pending against me, against my company now.

THE COURT: And sued because allegedly your company allegedly did something wrong?

JUROR WILLIAMS: Yes, sir.

THE COURT: All right. And that suit is still pending?

JUROR WILLIAMS: Yes, sir.

THE COURT: All right. The fact that that has occurred, would that, in anyway, influence your decision in this case?

JUROR WILLIAMS: No, sir.

THE COURT: Well, if it would, please tell us. I want to know whether it consciously or subconsciously, if you feel it would influence you.

JUROR WILLIAMS: I don't believe it would, sir.

THE COURT: In other words, what I want to make sure, Mr. Williams, is that if you sit as a juror in this case, and you go into the jury room, that you are not thinking of the circumstances of your case, and that you are actually just simply thinking about what was the evidence presented. The law as I give it to you, and render a decision without any thought whatsoever to Mr. Edmonson or Leesville Concrete Company. And can you do that?

JUROR WILLIAMS: Yes.

THE COURT: All right. Now, Ms. Fruge?

JUROR FRUGE: My father-in-law, I believe, came to court with a suit. His dog bit a little girl that was in the yard. And I believe they filed suit. But I really don't know any of the details about it. I don't think it would make any difference.

THE COURT: Well, let me make sure. I want you to tell me it will not make any difference.

JUROR FRUGE: No. It will not. I don't know any of the details.

THE COURT: All right. Anyone else? Mr. Gaspard?

JUROR GASPARD: I have an insurance company that has got a suit against our company, involving a salvage contract.

THE COURT: It is a suit on a contract?

JUROR GASPARD: Yes.

THE COURT: Would that, Mr. Gaspard, influence you in this case?

JUROR GASPARD: No.

THE COURT: Fine. Anyone else? Do any of you have any biases or prejudices against anyone who brings, who files a suit to recover for damages for injuries allegedly incurred in an accident? All right, Mr. White.

JUROR WHITE: Your Honor, a couple of years back, I don't know if this would have any influence on my decision, but a couple of years back, my brother's wife was robbed and raped in Plaquemines, Louisiana, a couple of years back.

THE COURT: Well, my question is, do you have any biases or prejudices against people who file a suit to recover for the injuries they allegedly incurred in an accident. Would you hold that against them because they filed a suit to recover for injuries they think was caused by someone else?

JUROR WHITE: Well, my brother, you know, he went through a whole bunch of stuff since this. And, naturally, that has some influence, you know, on the way I think.

THE COURT: Yeah. But you see, you are talking about a criminal situation.

JUROR WHITE: Yeah.

THE COURT: We are not talking about a criminal situation here, Mr. White. But I don't want to put words in your mouth because I want you to be honest with us. Because all the attorneys want to make sure you fully understand and can be a fair and impartial juror. And again, the question is simply that if somebody is injured in an accident, do you hold it against them if they

brought suit against the party allegedly causing the accident, to recover for their injury?

JUROR WHITE: No.

THE COURT: Can you do that in this case?

JUROR WHITE: Yes, sir.

THE COURT: In other words, if Mr. Edmonson proves that he was injured as a result of the actions of the defendant, would you render a verdict in his favor and award him damages that you find he is entitled to?

JUROR WHITE: Yes, sir.

THE COURT: And it would not influence your decision in any other way?

JUROR WHITE: No.

THE COURT: Anyone else? All right. Now, ladies and gentlemen, I am going to ask that you stand individually, and I will tell you now what it is, but I will prompt you in case you forget. I want your name, your address, your age, your occupation, your spouse's occupation and the number of children. I do not want the names or ages of your children. I know you are proud of them, but I just want to know how many. The other thing, the ladies are permitted, if they wish, to simply say I am over eighteen. So for an example, Ms. Fruge, if you don't want to tell us how old you are, that is all right. You can say I am over eighteen. On the other hand, Mr. Gaspard, you are going to have to tell us.

JUROR GASPARD: I have got to do it whether I want to or not?

THE COURT: All right. Would you start, Mr. Gaspard, please?

JUROR GASPARD: I am fifty. My name is Rod Gaspard. We own AGCO Auto Parts, auto parts salvage business.

THE COURT: That is a good idea. You might have a customer here.

JUROR GASPARD: Yeah. I was thinking about that all the time.

THE COURT: Surely.

JUROR GASPARD: Our business is located at 4401 South Lincoln Road, Lake Charles. My wife works in the business. I think she probably runs the thing. We have two children.

THE COURT: And you said you are fifty?

JUROR GASPARD: I am five-o, right.

THE COURT: And where do you live?

JUROR GASPARD: We live at Big Lake right now.

THE COURT: All right. Good. Thank you. Mr. Bradley?

JUROR BRADLEY: Ron Bradley. I live in DeRidder, twenty-five years old. I am not married. I don't have no kids. I work for Brock Construction out of DeRidder, Louisiana.

THE COURT: You do what, sir?

JUROR BRADLEY: I work for Brock Construction. I am a bucket truck operator.

THE COURT: Brock Construction Company, doing what, sir?

JUROR BRADLEY: Running a bucket truck, bucket truck operator.

THE COURT: A bucket truck operator?

JUROR BRADLEY: You know, like a high line.

THE COURT: All right.

JUROR BRADLEY: I run one of them.

THE COURT: All right, sir. Thank you very much.

JUROR ELOI: My name is Ara Eloi. I live at 217 Leland Street in Sulphur. My husband is a machinist. And we own a small company, Eloi Enterprises. And I have three children. And I am sixty-three years old.

THE COURT: And your husband, what kind of business is it, ma'am?

JUROR ELOI: It's a trailer park. And he has a rent house or two, and fifteen large trailer spaces, and then travel trailer spaces.

THE COURT: All right. Thank you very much.

JUROR ELOI: It's a small corporation.

THE COURT: All right. Ms. Hansbrough.

JUROR HANSBROUGH: I am Gladys Hansbrough. I live in DeQuincy, Louisiana. I have four children, four girls. One a paralegal aid lawyer. One drives for Greyhound, and the other one is a teacher. They are in Detroit. My baby girl is, she lives here in DeQuincy. She is a nurse's aid. I am a retired nurse and—

THE COURT: How about your husband?

JUROR HANSBROUGH: I am a widow.

THE COURT: How long have you been a widow?

JUROR HANSBROUGH: Seven years.

THE COURT: All right. Thank you very much. Mr. Combs.

JUROR COMBS: My name is Willie Combs. I live at 1010 8th Avenue. I am a lab technician at Himont, Incorporated. I have two children. My wife works in the home.

THE COURT: All right. Thank you. Mr. Simmons.

JUROR SIMMONS: My name is Wilton Simmons. I live in Kinder, Louisiana. Married. I have four children, grown. And I am retired.

THE COURT: What did you do before you retired?

JUROR SIMMONS: Worked in a cleaners.

THE COURT: I didn't hear you, sir.

JUROR SIMMONS: Worked in a cleaners, manager of it.

THE COURT: All right. And your wife is a housewife?

JUROR SIMMONS: House maid.

THE COURT: Thank you, sir. Mr. Dougherty.

JUROR DOUGHERTY: My name is Robert Dougherty. I reside at Route 1, Box 170, Roanoke. Personnel services officer for Jeff Davis Vo-Tech School in Jennings. My wife is a first grade teacher in Jennings. I have two children, a daughter twenty-one and a son eighteen.

THE COURT: And how old are you?

JUROR DOUGHERTY: I am forty-six.

THE COURT: Thank you very much.

JUROR ELOI: I am sixty-three.

THE COURT: Sixty-three. Okay. You didn't have to tell us. Mr. Paniuski.

JUROR PANIUSKI: My name is Lawrence John Paniuski. I live at 3001 Reidway, here in Lake Charles. Age fifty-six. And I have three children. And my wife stays home. And I work for Orkin Pest Control, service technician.

THE COURT: All right. Thank you. Mrs. Fruge.

JUROR FRUGE. My name is Nikki Fruge. I live at Route 4, Box 524, in Moss Bluff. I work for Magnolia Life Insurance as a mail clerk, file clerk. My husband works at Vista Chemicals. I have three children. And I am thirty-one.

THE COURT: All right. What does your husband do for Vista?

JUROR FRUGE: Chief warehouseman.

THE COURT: Thank you. Mr. Williams.

JUROR WILLIAMS: Charles T. Williams. Route 1, Anacoco, Louisiana. Me and my wife own two companies, general dirt contracting business. I am forty-four years old. And we have three children. And she is my partner and bookkeeper.

THE COURT: Thank you, sir. All right. Mrs. McBride.

JUROR McBRIDE: Eloise McBride. I am a widow. I work as a cashier. And I have four children.

THE COURT: And you are over eighteen?

JUROR McBRIDE: And I am over eighteen.

THE COURT: And where do you work, Mrs. McBride?

JUROR McBRIDE: Market Basket in Moss Bluff.

THE COURT: Thank you, ma'am. Mr. Soileau.

JUROR SOILEAU: My name is Phil Soileau. I am thirty-seven. I am a service engineer for Pitney Bowes. I have a wife that is a beautiful homemaker. And I have three children.

THE COURT: Thank you, Mr. Soileau. Mr. Dugas.

JUROR DUGAS: My name is Wavelle Dugas. I am twenty-seven. I am a warehouse manager in Welsh. And I have two kids.

THE COURT: Thank you, sir. Mrs. Yellott.

JUROR YELLOTT: My name is Roberta Yellott. I live at 436 Washington Street, in Lake Charles. I am assistant professor of mathematics at McNeese. My husband teaches geometry and coaches basketball at St. Louis High School. And we have three children.

THE COURT: Thank you, ma'am. Mr. Smith.

JUROR SMITH: My name is Ray Smith. I live at Route 1, Box 4, Ragley. And let's see. I am thirty-three years old. I work for the U.S. Postal Service here in Lake Charles as a letter carrier. My wife is a clerk for the Postal Service. And no kids.

THE COURT: Your wife is what, sir?

JUROR SMITH: A clerk for the Postal Service, downstairs, also.

THE COURT: All right. And you have how many children?

JUROR SMITH: No kids.

THE COURT: Thank you, sir. Mr. Albarado.

JUROR ALBARADO: James Albarado. I live at Route 3, Box 442, Lake Charles. Forty-two years old. I am a welder by trade. I have two kids. My wife is office manager for a computer company here in Lake Charles.

THE COURT: Thank you. Mr. White.

JUROR WHITE: My name is John White. I live at 102 Willow Lane, Ragley. I am a construction painter. And I am thirty-nine. My wife is a homemaker.

THE COURT: Any children?

JUROR WHITE: Two.

THE COURT: Thank you, sir. Mr. Askew.

JUROR ASKEW: John Askew. I am forty-two years old. I live at 732 Esplanade in Lake Charles. I am branch manager of Metropolitan Insurance Company here

in Lake Charles. I have two children. And my wife is a homemaker.

THE COURT: Thank you very much. All right. Gentlemen, do you want to approach the bench, please?

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

THE COURT: Mr. Williams.

(Proceedings at the bench, with Juror Williams and all counsel present.)

THE COURT: Mr. Williams, I want to ask you these question briefly because I want to make sure I understand. Now, in this particular case we have a person who was not working for Leesville Company, Leesville Concrete Company. He alleges some fault on their part in causing his accident. Now, what you were telling me, as a contractor, you were being sued to pay an employee of another company?

JUROR WILLIAMS: Same thing. Yes, sir.

THE COURT: Same thing. Yes, sir. And only you can answer. And I am just wondering if you feel like you can put aside your situation, if you hear this evidence develop, could you put aside your situation as if you never had—

JUROR WILLIAMS: I don't know. It would be hard for any human being to do that.

THE COURT: That is the reason I brought it up.

JUROR WILLIAMS: Yes, sir.

THE COURT: I think maybe under those circumstances, because of your position, I think maybe I might better let you off this one and get you on another one. Mr. Honeycutt, do you have any problem with that, sir?

MR. HONEYCUTT: No, sir.

THE COURT: Just go and have a seat, and we will let you go in a minute.

(Proceedings in open court, jury present.)

THE COURT: Mr. White, sir, would you come on up, please?

(Proceedings at the bench, with Juror White and all counsel present.)

THE COURT: Mr. White, now, you said that you have a brother whose wife was raped.

JUROR WHITE: Yes, sir.

THE COURT: Was this a black fellow that raped your brother's wife?

JUROR WHITE: Yes, sir.

THE COURT: Is that what you had your problem with here?

JUROR WHITE: Yes, sir.

THE COURT: Do you feel you would hold it against this man because a black raped your sister?

JUROR WHITE: I would like to say no, but I can't feel sure about it.

THE COURT: All right. Okay.

JUROR WHITE: I am being as honest as I can be.

THE COURT: All right. Okay. Do you have any problem, Mr. Honeycutt, with the court excusing him?

MR. HONEYCUTT: No, sir.

THE COURT: All right. Mr. Doyle, do you, sir?

MR. DOYLE: No, sir.

THE COURT: All right. Thank you. Go ahead and have a seat.

THE COURT: You see why I want to do this privately. Because I don't want to contaminate the jury.

MR. DOYLE: Yes, sir. I appreciate that.

THE COURT: Any other questions, Mr. Doyle?

MR. DOYLE: I am not sure I understood what that fellow Bradley said he did for a living.

THE COURT: Bradley, bucket truck operator.

MR. DOYLE: Okay.

THE COURT: That's what he said, but he said it so fast. That's why I had him repeat it.

MR. DOYLE: I don't have any other question.

THE COURT: Okay.

(Proceedings in open court, jury present.)

THE COURT: All right, ladies and gentlemen. As a judge, I feel a lot of times that we have to let the jury know everything that is going on. But I had some private questions I wanted to ask Mr. Williams and Mr. White, so that I could determine further whether they are qualified to serve as a juror. And I have made the determination that I am going to excuse Mr. Williams and Mr. White. So, gentlemen, you are free to go. You do not have to come back. And the government will mail you a check plus your traveling expenses in the next two or three weeks. Thank you so much for being so willing to perform your civic responsibility. All right. Draw two names, Mr. Chaddick, please. The first will take Mr. Williams' seat, and the second will take Mr. White's seat.

THE MARSHAL: As I call your name, will the first person occupy this empty seat over here, please. Number forty-two, Harold Herford. Number thirty-nine, Ms. Edith Klenk.

THE COURT: All right. For the time being, I am going to direct my questions to Mr. Herford and Ms. Klenk. First of all, did you hear me state what the case is about, and the parties involved?

JUROR HERFORD: Yes, sir.

THE COURT: All right. Did you hear me introduce the attorneys to the jury?

JUROR HERFORD: Yes, sir.

THE COURT: Do either of you know any of the attorneys or any of the parties involved in this case?

JUROR HERFORD: I know this nice gentleman over here, Mr. Doyle.

THE COURT: All right, sir.

JUROR HERFORD: We go to the same church.

THE COURT: Well, the fact that you go to the same church as Mr. Doyle, would that, in anyway, influence your decision in this case?

JUROR HERFORD: No.

THE COURT: And again, in particular, since you say you go to the same church as Mr. Doyle, if you were to sit on this jury and render a verdict in favor of the defendant, would you feel, the next time you ran into Mr. Doyle, that would, in anyway, embarrass you?

JUROR HERFORD: No, sir.

THE COURT: In other words, you would be willing to call it as you see it based on the law and the evidence and nothing else?

JUROR HERFORD: That's correct.

THE COURT: Ms. Klenk, do you have any comment on that?

JUROR KLENK: No, sir.

THE COURT: All right. You have heard me ask the other questions about serving on jury duty. Have either or you served on a jury?

JUROR HERFORD: I served on the jury in this court in January of last year.

THE COURT: What kind of case? Do you remember?

JUROR HERFORD: The case with the laborers local —well, I don't recall whether—

THE COURT: Oh, was that the case of United States of America versus Freeman Lavergne and Mose Collins?

JUROR HERFORD: Yes, sir.

THE COURT: You served on that jury, sir? That was a criminal case. All right. Any other cases that you have served on?

JUROR HERFORD: Oh, many years ago I served on one in the parish court. I suppose you would call it a damage case. But it resulted in no payment.

THE COURT: All right. Ms. Klenk, did you ever serve on a jury before?

JUROR KLENK: I served on a grand jury in DeRidder.

THE COURT: All right.

JUROR KLENK: About two years ago. And on a case here about a year and a half ago.

THE COURT: All right. Has anyone attempted to contact either of you concerning this case? All right. Have any of you, or any members of your immediate family ever filed a suit or claim against someone as a result of an accident?

JUROR HERFORD: No.

THE COURT: Or has anyone ever filed a suit or claim against you or any member of your immediate family? Do either of you have any bias or prejudice against someone who brings a lawsuit seeking to recover damages or injuries he alleges he incurred? All right. Then, Mr. Herford, we will start with you first. Would you stand and give your name, address, age, occupation and spouse's occupation, and number of children?

JUROR HERFORD: I am Harold Herford. I live at 800 Dolby Street, Lake Charles. I am retired. I am married. My wife has two children, I have three children. We have a bunch of grandkids. Anything else?

THE COURT: All right. And what did you do before you retired, sir?

JUROR HERFORD: I worked in a refinery, Conoco Refinery, in Westlake.

THE COURT: And what was your last job?

JUROR HERFORD: Operator foreman over the coking unit.

THE COURT: All right, sir. Thank you very much, sir. Ms. Klenk.

JUROR KLENK: My name is Edith Klenk. I live at 8 Cathy Drive, DeRidder, Louisiana. Sixty years old. I work for two doctors at Doctors Clinic as an administrator. And I have four children. And my husband is deceased.

THE COURT: All right. And you are over eighteen?

JUROR KLENK: Yes, sir.

THE COURT: All right. Thank you. All right. May I see the attorneys again, please?

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

THE COURT: Ms. Klenk, I have been advised that the plaintiff's wife takes her child or children to your clinic. Do you know that?

JUROR KLENK: I am not aware of it right now. I could probably refresh my memory.

THE COURT: Well, no. But for an example, the wife may testify in this case. And I want to know if you saw her, would you recognize her?

JUROR KLENK: I probably would.

THE COURT: All right. But then my question would be, the fact that she may go to the clinic where you work, I want to know would that, in anyway, influence your decision in this case?

JUROR KLENK: No, sir. I don't think so.

THE COURT: Well—

JUROR KLENK: No, it won't.

THE COURT: All right. Thank you. Mr. Herford, let me just ask you a question. And I want to make sure that I understand correctly. You see, what is going to be happening here is throughout the trial these attorneys will be asking questions. And at the end of the trial, they will be making their arguments to you. And I want to know, will you give more credence to this nice Mr. Doyle that you say that you know, and you go to church with, over the statements of Mr. Honeycutt?

JUROR HERFORD: Well, I shouldn't have said this nice Mr. Doyle. That was just repeating what you said.

THE COURT: Oh, you didn't do anything wrong, sir.

JUROR HERFORD: No. I don't honestly feel that our relationship would influence my opinion, in anyway.

THE COURT: And again, what I want to know is, in the event you should end up ruling, the jury rules for the defendant, that when you ran into Mr. Doyle, it would not, in anyway, embarrass you?

JUROR HERFORD: No.

THE COURT: In other words, you are going to call it as you see it?

JUROR HERFORD: Yes, sir.

THE COURT: You are going to listen to their arguments, but you are going to listen to the arguments with respect to what they argue about what the evidence is, and whether your interpretation of the evidence agrees with what they say?

JUROR HERFORD: Yes, sir.

THE COURT: And you will not give more to him simply because he goes to the same church as you?

JUROR HERFORD: No, sir. I haven't known him that long. I just do know him.

THE COURT: All right. All right, ladies and gentlemen. I am now going to submit to you a list, call off names of witnesses, and ask if you know any of them. And you are going to have to excuse my pronunciation of some of them. And I may need the lawyers to help me. First is Fred Bolgiano, William D. Sines, S-i-n-e-s. No, I am asking the jury if they know them. Eugene Brickhouse, Dr. Bruce E. Razzer, Charles O. Bettinger, Dr. William Cruze, Mrs. Crystal Edmonson.

THE CLERK: Judge.

THE COURT: Oh, all right. You say you know Dr. Cruze?

JUROR KLENK: I know Dr. Cruze, yes, sir. He used to be associated with our clinic.

THE COURT: All right. The fact that you know him, would you give his testimony any more weight than any other doctor simply because you know him?

JUROR KLENK: No.

THE COURT: Or would you give him less? You would not give him less weight either, would you?

JUROR KLENK: No, sir.

THE COURT: All right. Charles Schriber, Dr. Clark Gunderson. Mr. Soileau, do you know Dr. Gunderson?

JUROR SOILEAU: Dr. Gunderson was the doctor when my daughter broke her arm. He was her doctor.

THE COURT: Uh-huh. Now, would that, in anyway, influence your decision?

JUROR SOILEAU: No, sir.

THE COURT: In other words, again, I will ask the same question that I asked the other lady. The fact that he treated your daughter, would you give his testimony more weight than any other doctor in this case?

JUROR SOILEAU: No, sir.

THE COURT: Ms. Yellott.

JUROR YELLOTT: Dr. Gunderson treated my ankle.

THE COURT: Your ankle?

JUROR YELLOTT: Yes, sir.

THE COURT: Would that cause you any problem?

JUROR YELLOTT: No, sir.

THE COURT: In other words, if you don't agree with his testimony, that is the way it will be, is that right?

JUROR YELLOTT: Yes, sir.

THE COURT: Because there will be a lot of doctors testify. And you are going to have to determine from all these doctors who you believe and who you don't believe, or whether you accept their opinions or not, let's put it that way. All right. Anyone else on the back row? All right. Dr. Gilles R. Morin, Rick Tanner, Mrs. Fred Bolgiano, Kenneth Gordon, D. L. Elliott, Samuel James, Richard Thompson, Bernice Cryer, Dr. Percy Miller, Dr. George Hearn, Leonard Michaels, Peggy Kelly, Dr. Kenneth Boudreaux, Dr. J. Stewart Wood, Dr. James T. Murphy, Rebecca Broussard, Paul D. Ware, Dr. William Akins, Dr. R. Dale Bernauer, Dr. Gregory D. Lord, Dr. J. Lane Sauls, Dr. Fayez Shamieh. Wait, did you know Dr. D. Lord?

JUROR KLENK: Dr. Sauls.

THE COURT: Oh, Dr. Sauls.

JUROR KLENK: He was associated with our clinic, also.

THE COURT: He was, at one time?

JUROR KLENK: Yes, sir.

THE COURT: And, again, you are telling this court that you will not give him any more weight, his testimony any more weight than any other doctor?

JUROR KLENK: No, sir.

THE COURT: Unless you are impressed with the testimony here as opposed to you knowing him?

JUROR KLENK: Right.

THE COURT: All right. And Dr. Walter T. Snow. Mr. Askew?

JUROR ASKEW: I know Dr. Shamieh socially.

THE COURT: All right. The fact that you know him socially, would that cause you to give his testimony more weight than any other doctor in this case, sir?

JUROR ASKEW: No, Your Honor.

THE COURT: All right. Thank you. Gentlemen, may I see you at the bench again, please?

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

THE COURT: Ms. Klenk, would you come up, please, ma'am? Mr. Williams.

(Proceedings at the bench.)

THE COURT: Ms. Klenk, I want to just make sure we don't put you in an embarrassing position. And only you can answer. Now, you know some of these doctors?

JUROR KLENK: Yes, sir.

THE COURT: But, now, you say you are the administrator at the hospital?

JUROR KLENK: At the clinic.

THE COURT: At the clinic?

JUROR KLENK: Yes, sir.

THE COURT: Now, if I am not mistaken, I think maybe some other doctor treated this man when he first got hurt there in this clinic.

JUROR KLENK: That could be true. I am not sure.

THE COURT: All right. But what we are really concerned about is that having worked with these doctors, we are concerned, if not consciously but subconsciously, that could interfere with your decision in this case.

JUROR KLENK: Okay.

THE COURT: But I am not saying it will, but I am pointing out what your concerns are.

JUROR KLENK: Uh-huh.

THE COURT: And we certainly don't want to put you in an embarrassing position. Because if some of these fellows happen to come back to the clinic, although the first question you will be deciding is liability, which wouldn't have anything to do with treatment.

JUROR KLENK: I understand.

THE COURT: You see, but I am just wondering if this will, in anyway, give you any problems?

JUROR KLENK: Well, it is a small town. The doctors all go to the same church, you know, as we do. So I would be running into them. I don't know if they would feel—I would have no—

THE COURT: You see—

JUROR KLENK: —problem with it. But I don't know if they would.

THE COURT: Let me give you what may be an issue in the case. What the issue may be is whether this accident which this man contends caused him the injury that he has now, and the other side is saying the accident did not cause the things he is complaining about now. And that is where the problem comes in. You see, if you know these people, would you turn around and say, well, after working there I believe him, whereas if you heard another doctor say, no, it wasn't caused by the accident, how it would affect your decision.

JUROR KLENK: I think one that you knew would maybe influence you a little.

THE COURT: Well, let me say this. I don't have any problem, I can excuse you if you think it might pūt you in an embarrassing position.

JUROR KLENK: Okay.

THE COURT: Because we have others.

JUROR KLENK: I think I would rather not serve on this jury if it wouldn't cause—I could be—

THE COURT: You could try to do as well as you could.

JUROR KLENK: Yes, sir. But I would not mind being excused. That would not bother me.

THE COURT: All right. Mr. Doyle?

MR. DOYLE: Judge, I certainly have no objection.

THE COURT: Mr. Honeycutt?

MR. HONEYCUTT: Ms. Klenk had indicated it wouldn't bother her to see the doctors if it wouldn't bother them. I am not sure she understands the doctors are not to come live to the trial here. They wouldn't know she is on the jury. In essence, they are all video doctors. So there wouldn't be the face-to-face confrontation.

THE COURT: Do you understand what he is saying?

JUROR KLENK: Yes, sir.

THE COURT: No doctor will appear here live.

JUROR KLENK: Okay. I could look at the evidence without any prejudice, I am sure. But if it is going to be a problem, I don't want any of you all to think I might be swayed.

THE COURT: No, ma'am. It is not a question of what they feel.

JUROR KLENK: Okay.

THE COURT: No. It is simply to make sure, what the ultimate question is, whether you think you can be fair and impartial.

JUROR KLENK: Yes, sir, I think I can.

THE COURT: That's what he wants, and that's what he wants.

JUROR KLENK: Okay.

THE COURT: In other words, all we are saying, if you work for some people, then it is kind of difficult to say, it may be contrary to what they think.

JUROR KLENK: Yes, sir.

THE COURT: And then on the othed hand, you could run into these people again.

JUROR KLENK: Yes, sir, probably so.

THE COURT: And then if they find out you have been on the jury, some of them may be offended.

JUROR KLENK: Right.

THE COURT: Since it is the plaintiff's family going to the clinic.

JUROR KLENK: Yes, sir. Even though I can't place them right at this minute, I am sure they will be coming back. And it might make them feel—

THE COURT: Well, what would you prefer to do, ma'am, in this situation?

JUROR KLENK: I would prefer not to serve, I think.

THE COURT: On this case?

JUROR KLENK: Yes, sir.

THE COURT: Some other case maybe, but not this one?

JUROR KLENK: Right.

THE COURT: Because of the relationship?

JUROR KLENK: Right.

THE COURT: To the parties involved and some of the witnesses?

JUROR KLENK: Right.

THE COURT: Okay. I think the only fair thing, because I don't feel that a juror should be put in a position that they have to be concerned with rendering a verdict, and knowingly saying, well, I want to make sure I am doing this as opposed to this. I think it could put you in a position where you would maybe overreact.

JUROR KLENK: Sometimes I overreact the other way.

THE COURT: That's true. All right. Thank you, ma'am. We are going to excuse you, and you can go home. And you don't have to come back until you get another notice.

JUROR KLENK: Okay.

THE COURT: Yes, ma'am.

(Proceedings in open court, jury present.)

THE COURT: Mr. Chaddick, call one name, please.

THE MARSHAL: Number four, Odgen Abshire.

THE COURT: Mr. Abshire, did you hear me state what the case was about?

JUROR ABSHIRE: Yes, sir.

THE COURT: Do you know anything about this case other than what you have heard in the courtroom today?

JUROR ABSHIRE: No, sir.

THE COURT: Did you know anything as to all the other questions I have asked the other jurors that you should answer in the negative?

JUROR ABSHIRE: No, sir.

THE COURT: Have you ever filed a suit or claim against anyone?

JUROR ABSHIRE: No, sir.

THE COURT: Or any member of your immediate family?

JUROR ABSHIRE: I beg your pardon?

THE COURT: Or any member of your immediate family ever file suit?

JUROR ABSHIRE: No, sir.

THE COURT: Anyone ever file a suit or claim against you, or any member of your immediate family?

JUROR ABSHIRE: No, sir.

THE COURT: All right. Why don't you just stand, sir, and give your name, address, age, etc.?

JUROR ABSHIRE: I can give you everything but my address.

THE COURT: Ail right, sir.

JUROR ABSHIRE: I just moved to a new place.

THE COURT: All right.

JUROR ABSHIRE: I am camping. My name is Odgen Abshire. I live at 3619 Texas Street, Apartment 50.

THE COURT: That is in Lake Charles?

JUROR ABSHIRE: Lake Charles. I am retired. Sixty-seven years old. I got four kids. My wife is retired.

THE COURT: All right. And what did you do before you retired, sir?

JUROR ABSHIRE: I was manager for Boyce Machinery.

THE COURT: What? You were sales manager or general manager or what?

JUROR ABSHIRE: Branch manager.

THE COURT: Branch manager here in Lake Charles, sir?

JUROR ABSHIRE: Yes, sir, in Lake Charles.

THE COURT: All right, sir. What did your wife do before she retired?

JUROR ABSHIRE: She was a nurse's aid at Memorial Hospital.

THE COURT: All right, sir. Thank you very much. You may be seated. All right, gentlemen. One more time, please.

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

(Proceedings in open court, jury present.)

THE COURT: I want to apologize to you, Mr. Abshire, but I am going to ask you a question. I think it is a stupid one, but I have been requested to ask you, so I am going to ask you. Do you know what a concrete truck is?

JUROR ABSHIRE: Yes, sir.

THE COURT: I thought you would.

JUROR ABSHIRE: Yes, sir.

THE COURT: And do you know what a curb and gutter machine is?

JUROR ABSHIRE: A what, sir?

THE COURT: A curb and gutter machine?

JUROR ABSHIRE: Yes, sir.

THE COURT: Okay. All right.

(Whereupon an off-the-record discussion was had between court and counsel at the bench.)

(Proceedings in open court, jury present.)

THE COURT: Do you know any of the witnesses' names who I called off, Mr. Abshire?

JUROR ABSHIRE: No, sir.

THE COURT: All right. Thank you very much. Ladies and gentlemen, I apologize for taking so long to do this job. Normally, we finish it in half that time. We are going to take a break and ask you to come back in ten minutes, and then we are going to tell you who will serve and who won't serve. So we will take a break. You can walk around outside, but come back and occupy the same seats you are occupying. With that, court is in recess for ten minutes.

(Resuming after a recess.)

(Proceedings in chambers, all counsel present.)

THE COURT: All right, Mr. Williams. The court has before it a motion by defendants to quash the taking of a deposition of—who was that?

MR. DOYLE: Mrs. Bolgiano, Samuel James and Rebecca Broussard. But it was primarily about her.

THE COURT: And the court had a conference in this matter, and the court made a ruling. Mr. Doyle, do you want to put the ruling on the record?

MR. DOYLE: Yes, sir. Under the rule, the deposition would be quashed because they were noticed outside the contemplation of your local rule, which required that discovery be completed thirty days prior to trial, which all sides acknowledged. But because of the nature of the testimony we were trying to ascertain from at least Ms. Bolgiano, who had never been deposed before, you indicated that since she apparently is going to testify about bribery, or some alleged bribery, that after the plaintiff had an opportunity to give his direct examination on the witness stand, that you were going to conduct an in-chambers interview, with counsel present, with witnesses who had this alleged bribery testimony to give, so you could make some finding as to whether it would be allowed, I suppose, or whether it was maybe just to give all sides an opportunity to determine what they were going to say. I don't really know the purpose of the in-

chambers hearing. But I know it was discussed at the time we talked about the depositions.

THE COURT: And, Mr. Honeycutt, basically, is that correct?

MR. HONEYCUTT: That is basically my understanding. Simply the depositions were quashed and after the plaintiff testified on direct, you wished to interview the witness on the bribery question in chambers.

THE COURT: Let me see if I can recall it correctly, that before I would allow you to ask any question about the bribery—

MR. DOYLE: That's right.

THE COURT: —I would interview the witnesses?

MR. DOYLE: That's right.

THE COURT: I would have the information, and then I would then decide whether you should be granted permission to inquire as to this question, isn't that what you recall?

MR. HONEYCUTT: I believe that is correct, Your Honor.

THE COURT: All right. Let the record reflect the court's ruling. And this reflects taking care of the motion to quash the taking of the depositions, which I have before me. All right. That takes care of that. All right. Well, Mr. Doyle, is this yours, sir?

MR. DOYLE: Judge, I am sorry.

THE COURT: Would you change that, please?

MR. DOYLE: Yes, sir. That is the force of habit, Judge.

THE COURT: Let the record reflect and note the change, both said challenges for the defendant. All right. But I want to make sure—

MR. HONEYCUTT: That is mine, Judge.

THE COURT: The plaintiff challenges Mr. Paniuski, number twenty-eight; Dugas, number five; Askew, number thirty-two. The defendant challenges number three, Combs; number forty-two, Harold Herford, and number twelve, Simmons.

MR. DOYLE: Your Honor, I have an objection to make for the record.

THE COURT: All right, sir.

MR. DOYLE: Based on the case of Batson versus Kentucky, Your Honor. I would ask that the court recognize that two of the jurors challenged preemptorily by the defendant in this case are black, and that the plaintiff is black. Batson versus Kentucky is cited at 106 Supreme Court Reporter 1712. It was decided on April 30th of 1986, and it specifically rules that the sixth and fourteenth amendments, the portion of the fourteenth amendment dealing with the use of preemptory challenges to exclude jurors based solely on race without a voiced neutral explanation by the party challenging violates a litigant's rights under the sixth and fourteenth amendments. Now, the Batson case was a criminal matter. But some of the quotations from the Batson case that are particularly important to this one are on page 1716, which recognizes that previous decisions laid the foundation for the Supreme Court. And I am quoting, unceasing efforts to eradicate racial discrimination in the procedure used to select the venire from which individual jurors are drawn. So under Batson versus Kentucky, Your Honor, I am arguing the defendant in the case is not entitled to exercise a preemptory challenge to exclude a juror from service solely based on race, when that race is the same as that of the litigant, and otherwise he has to articulate a neutral explanation.

THE COURT: Let me ask you a couple of questions, Mr. Doyle.

MR. DOYLE: Yes, sir.

THE COURT: Since you are quoting amendments to the Constitution of the United States, sir, what does the sixth amendment say?

MR. DOYLE: Judge, I don't have it quoted verbatim.

THE COURT: Well, I want to know what it says, sir.

MR. DOYLE: I am quoting out of the Batson case.

THE COURT: Now, you are making an argument to me, sir. I want you to tell me what does the sixth amendment say, and what does it deal with?

MR. DOYLE: I can't quote it to you.

THE COURT: Let's get it out and see.

MR. DOYLE: All right, sir.

THE COURT: Let's get off the record and get it and see.

(Whereupon an off-the-record discussion was had between court and counsel.)

THE COURT: Okay. Let's get on the record. All right. The court has just finished going through the preemptory challenges and has the jury picked in this case. And now, Mr. Doyle, representing the plaintiff, now objects to the defendant preemptory challenging two black jurors. I don't recall, but I know we had several black jurors on the panel. I am told there were three. I didn't count them. I don't count whether they are black or white. I just count whether we have twelve people. Now, Mr. Doyle has raised the question at this point, and his argument first started off under the sixth and fourteenth amendments to the Constitution of the United States. He wants me to require the defendant to elicit, for me to elicit from the defense counsel why he has challenged two black jurors in this case. It is always amazing to the court that the plaintiff is black, and the court notes that the plaintiff did not challenge any of the black jurors. Maybe I ought to ask the plaintiff's lawyers, since he wants to challenge only white jurors, because his client is black, whether he should explain why he did not remove any of the black jurors. But I won't do that. But I find that this is an issue which counsel for the plaintiff should have known before appearing in court and selecting the jury today. This court did not know the color of the plaintiff in this case until the case started. If counsel for the plaintiff had an argument, he certainly

should have given the court the privilege and opportunity of having the right to research and check out the law. And all he has furnished the court is the case of Batson versus Kentucky, which is a criminal case and deals with criminal matters. So the request by plaintiff's attorney to have the defense attorney explain the reasons why he exercised a preemptory challenge the way he did is denied. Now, do you want to add something else on the record?

MR. DOYLE: No, Your Honor.

THE COURT: Mr. Honeycutt, do you want to add something on the record, sir?

MR. HONEYCUTT: No, sir.

THE COURT: All right. We will proceed in court and select the jury, and then recess until after lunch.

MR. DOYLE: Thank you.

THE COURT: We will see you in court in about two minutes, gentlemen.

MR. HONEYCUTT: All right, sir.

MR. DOYLE: Thank you, judge.

(Proceedings in open court, jury present.)

THE COURT: Mr. Chaddick, will you tell those who are to take their seat in the audience?

THE MARSHAL: As I call your name and number, would you please have a seat in the gallery? Number three, Willie Combs; number five, Wavelle Dugas; number twelve, Wilton Simmons; number twenty-eight, Lawrence Paniuski; number thirty-two, John Askew; number forty-two, Harold Herford.

THE COURT: All right. Do you want to swear them, please?

(Whereupon the jury panel was duly sworn by the clerk.)

THE COURT: All right, ladies and gentlemen. I will just be very brief with you now, because we are going to let you go to lunch. I simply want to tell you that I will ask that you not speak to anyone about the case. Specifically, I am going to ask that you not speak to any

of the attorneys, or any of the parties in this case. For an example, if you meet them in the hall, do not say good morning, good afternoon, hello, or good-bye. Don't speak to them at all. Don't say a word to them. And I am instructing them not to say one word to you. So I want you to understand, first of all, of course, if a lawyer sees you coming, he recognizes you as a juror, and he may turn his head so that he doesn't have to be confronted with the situation. I want you to know he is not trying to be rude to you. He is carrying out my instructions because he can get in trouble with me if he violates this order. So that is the way we are going to operate. So when you come back from lunch, we will then tell you in great detail what you should or shouldn't do. Now, do you all think you can be back by 1:30? All right. Everybody be back at 1:30. Now, we will show you the jury lounge area where you will report when you come back. All right. Thank you. We will see you at 1:30.

(Jury excused.)

(Proceedings out of the presence of the jury.)

THE COURT: Does the plaintiff have anything further to cover?

MR. DOYLE: No, sir, Your Honor, not at this time.

THE COURT: Defense?

MR. HONEYCUTT: Not at this time, Your Honor.

THE COURT: All right. Court will be in recess until 1:30 p.m.

(Court recessed.)

AFTERNOON SESSION

(Proceedings out of the presence of the jury.)

THE COURT: All right, gentlemen. The court has been mulling over the question presented by plaintiff's counsel urging that the case of Batson versus the State of Kentucky is applicable in this case. And that any time there is a black defendant or black plaintiff, then

the opposing party in the civil or criminal case, in order to knock a person of the opposing party's race off the jury, must articulate his reasons showing they are non-race related. Am I correct, Mr. Doyle?

MR. DOYLE: That is a correct statement, Your Honor.

THE COURT: And in counsel's argument to the court, he argued that the Sixth Amendment of the Constitution of the United States applied, as well as the Fourteenth Amendment. And correct me if I am in error, counsel, but you said you could find no case to support your position, that you were entitled to have the defendant in this case articulate reasons why he preemptorily challenged two blacks today.

MR. DOYLE: Your Honor, so that I make clear, if Your Honor please, for the record, what I argued was that Batson contained language, which in my interpretation of it, allowed for reasonable extension of the law into an area that it does not now exist. There are no civil cases applying Batson or any case like it. On the issue of articulation of reasons for preemptorily challenging of jurors, I didn't mean to give the court the impression that any time there was in existence any civil case with a similar ruling.

THE COURT: Yeah.

MR. DOYLE: I am simply arguing for the good faith extension of Batson to civil cases.

THE COURT: All right. I agree with you, Mr. Doyle. And that is correct. You did tell the court you could find no case, civil case to support your position?

MR. DOYLE: That's right, Your Honor.

THE COURT: So if I incorrectly stated it, I want to correct it.

MR. DOYLE: No, sir. I just want to make it clear for the record. I didn't want the court to conclude that I had not been in good faith in arguing.

THE COURT: All right. Mr. Honeycutt, did you want to say anything before I go further?

MR. HONEYCUTT: Your Honor, our argument simply is that Batson is a criminal case. And the Sixth Amendment applies to rights and circumstances under criminal law. And that counsel could not and has not cited any civil authority at all to apply that criminal holding to a civil matter such as this one.

THE COURT: All right. Let the court go ahead and hold at this time so that hopefully we can proceed with the case. In the history of preemptory challenges, it has always been understood in both civil and in criminal cases that a party to a lawsuit had the right to excuse a certain number of people from the jury without giving any reasons therefor. And that has existed, as far as I know, since this Constitution of the United States went into existence two hundred years ago this year, and in fact, this month. And it was only recently that the Supreme Court of the United States went on to hold that in a criminal case, if the prosecution were to challenge black citizens where a black defendant was the defendant in the case, that the state had to articulate its legitimate reasons, and they have to be other than race as a basis for exercising its preemptory challenges. I have read the Batson case and I don't, I am unable by any stretch of the imagination to stretch the Batson case to apply to a civil case. And since I find no law that supports that position, I must accept the law as it exists now, and leave that up to the appellate court or the Supreme Court of the United States as to whether to change the preemptory system in civil jury cases. But again, for the record, so that the record is clear, so that the parties in the event that they want to appeal, in the qualifying of eighteen jurors in order to pick twelve of the eighteen qualified, three were of the black race, the same as the plaintiff. The plaintiff certainly did not challenge any of the black jurors. He challenged nothing but white jurors. The defendant challenged two of the three black jurors and a white juror. The court finds there is no discrimination, no violation of the law in the selection

procedure. And the motion to have the defendant articulate the reasons why he challenged the two black jurors is denied. I make this on the record so that in the event of an appeal, the record will be clear as to the court's ruling. And before we finish this issue, Mr. Doyle, I am going to give you an opportunity to add any and everything else you want on the record. Mr. Honeycutt, I will let you add anything else you want, then I will even let Mr. Doyle come back and add some more so that you have your full opportunity. So why don't you come up to the podium and make any further argument you wish. And I am not going to interrupt you. And I am not going to say another word about the issue.

MR. DOYLE: Thank you, Judge. The only other additional argument I would, or not argument, but point I would like to make for the record is upon receiving the correction from the court as to the proper amendment which applies to civil juries, my argument is that the Seventh Amendment gives a right to a civil jury, and that that right to a jury presupposes the same kind of jury, free from prejudice, that Batson mentions. And that is the only addition I would make, Your Honor.

THE COURT: Add anything else you want, Mr. Doyle.

MR. DOYLE: That's all I have got to say, Judge.

THE COURT: Please, please, now is your time.

MR. DOYLE: I am through, Judge.

THE COURT: All right. Mr. Honeycutt, do you want to add anything else, sir?

MR. HONEYCUTT: Yes, sir. Just to make what I hope will be a summary, and a concise statement, which is really sort of a rehashing of what I have already said, the case relied upon by the plaintiff's counsel, Batson versus Kentucky, was a criminal case. It was not a civil case. This is a civil proceeding. The amendment relied upon by plaintiff's counsel essentially was the Sixth Amendment to the United States Constitution, which is an amendment cited that relates to circumstances regard-

ing criminal rights and criminal law. Counsel, by his own admission, has not and cannot cite a single civil authority in support of his position, that I, as counsel for the defendant, articulate reasons for having challenged two of the three, preemptorily having challenged two of the three black members of the jury panel. As an aside, I would note that both plaintiff and defendant were accorded three challenges. There were three blacks. And if it were discriminatory action, the three, my three challenges could have been asserted against the three blacks. That has nothing to do with the matter. I simply threw that in as an aside remark. But essentially, the plaintiff can cite no civil authority, by his own admission, to have the holding in Batson apply to any civil proceeding, this one included. Thank you.

THE COURT: Mr. Doyle, come on up, please, sir.

MR. DOYLE: Judge, I have nothing further.

THE COURT: Please, if you have got somthing else, don't sit down, counsel. Come up and say it.

MR. DOYLE: Judge, I am going to save my breath. Thank you for the opportunity.

THE COURT: All right. Now, do we have another ruling to make before we get started?

(Proceedings deleted.)

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted in Printing)

SPECIAL INTERROGATORIES TO THE JURY

1. Do you find from a preponderance of the evidence that Leesville Concrete Company, Inc. was negligent in the manner claimed by Thaddeus Donald Edmonson and that such negligence was a legal cause of injury to Mr. Edmonson?

   Answer Yes or No Yes

   (If you answered "No" to Question 1, do not answer any of the following questions. You have finished your deliberations.)

2. If you answered "Yes" to Question 1, do you find from a preponderance of the evidence that Thaddeus Donald Edmonson was himself negligent in the manner claimed by Leesville Concrete Company, Inc. and that such negligence was a legal cause of his own injuries?

   Answer Yes or No Yes

   (If you answered "No" to Question 2, do not answer Question 3. Proceed to Question 4.

3. From a preponderance of the evidence, what proportion or percentage did the negligence of the respective parties, if any, legally cause Thaddeus Donald Edmonson's accident and injuries?

Leesville Concrete Company, Inc.	20%
Thaddeus Donald Edmonson	80%
TOTAL	100%

4. What is the total amount of damages, if any, that you find Thaddeus Donald Edmonson suffered as a result of the accident and injuries?

a) Loss of Past Earnings	$25,000.00
b) Loss of Future Earnings	$ ∅
c) Amount of *past* medical and hospital expenses incurred by Thaddeus Donald Edmonson as a result of the fault of the defendant	$ 1,200.00
d) Amount of *future* medical and hospital expenses to be incurred by Thaddeus Donald Edmonson	$ ∅
e) Amount of general damages	$63,800.00

SIGNED at Lake Charles, Louisiana, this 5 day of August, 1987.

/s/ Ray L. Smith
Foreperson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted in Printing)

JUDGMENT

The above numbered and entitled cause, having come on for trial by jury pursuant to regular assignment with plaintiff, defendant and intervenor present or represented; and the jury, after hearing the evidence, the argument of counsel and the instruction of the Trial Court, and having reached its verdict as rendered and signed on August 5, 1987, in the words and figures as follows:

1. Do you find from a preponderance of the evidence that Leesville Concrete Company, Inc. was negligent in the manner claimed by Thaddeus Donald Edmonson and that such negligence was a legal cause of injury to Mr. Edmonson?

   Answer Yes or No — Yes

2. If you have answered "Yes" to Question 1, do you find from a preponderance of the evidence that Thaddeus Donald Edmonson was himself negligent in the manner claimed by Leesville Concrete Company, Inc. and that such negligence was a legal cause of his own injuries?

   Answer Yes or No — Yes

3. From a preponderance of the evidence, what proportion or percentage did the negligence of the respective parties, if any, legally cause Thaddeus Donald Edmonson's accident and injuries?

Leesville Concrete Company, Inc.	20%
Thaddeus Donald Edmonson	80%
Total	100%

4. What is the total amount of damages, if any, that you find Thaddeus Donald Edmonson suffered as a result of the accident and injuries?

a) Loss of Past Earnings	$25,000.00
b) Loss of Future Earnings	$ 0
c) Amount of *past* medical and hospital expenses incurred by Thaddeus Donald Edmonson as a result of the fault of the defendant	$ 1,200.00
d) Amount of *future* medical and hospital expenses to be incurred by Thaddeus Donald Edmonson	$ 0
e) Amount of General Damages	$63,800.00

Ray L. Smith
Foreperson

IT IS ORDERED, ADJUDGED AND DECREED that the said verdict of the jury be and is hereby made the Judgment of this Court, and accordingly, the defendant, LEESVILLE CONCRETE COMPANY, INC., is hereby cast in Judgment for the sum of EIGHTEEN THOUSAND AND NO/100 ($18,000.00) DOLLARS, together with the legal interest thereon from date of judicial demand until paid with costs to be shared in equal amounts by plaintiff and intervenor together with defendant.

IT IS ORDERED, ADJUDGED AND DECREED that the intervenor, AMERICAN GENERAL FIRE & CASUALTY COMPANY, is entitled to be reimbursed for medical expenses and weekly benefits by preference and priority from the proceeds of the judgment in the sum of EIGHTEEN THOUSAND AND NO/100 ($18,000.00) DOLLARS together with legal interest from date of judicial demand.

JUDGMENT READ AND SIGNED in Lake Charles, Louisiana, this 28th day of September, 1987.

/s/ Eari E. Veron
Judge, United States District Court
Western District of Louisiana

/s/ James E. Williams
JAMES E. WILLIAMS
Lake Charles, LA 70602
Attorney for Plaintiff

/s/ John B. Honeycutt, Jr.
JOHN B. HONEYCUTT, JR.
Alexandria, LA 71309
Attorneys for Defendant

/s/ David McCain
DAVID MCCAIN
Lake Charles, LA 70602
Attorneys for Intervenor

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted in Printing)

MOTION TO NOTICE APPEAL TO THE COURT OF APPEAL FROM A JUDGMENT RENDERED BY A JURY FROM THE WESTERN DISTRICT OF LOUISIANA

NOW INTO COURT, through undersigned counsel, comes THADDEUS DONALD EDMONSON, who with respect represents that:

1.

NOTICE IS HEREBY GIVEN that THADDEUS DONALD EDMONSON, plaintiff above hereby appeals to the UNITED STATES COURT OF APPEALS FOR THE FIFTY CIRCUIT FROM A FINAL JUDGMENT rendered by a jury and said Judgment being signed and entered in this action on the 29th Day of September, 1987.

WHEREFORE, THADDEUS DONALD EDMONSON prays that his foregoing Motion be granted.

By His Attorney,
(A Professional Law Corporation)

/s/ Robert E. Patrick
ROBERT E. PATRICK
#7449
Attorney at Law
1114 Railroad Avenue
Lake Charles, LA 70601
(318) 433-7871 or 433-7873

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-4804

THADDEUS DONALD EDMONSON,
Plaintiff-Appellant,
v.
LEESVILLE CONCRETE COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

Dec. 5, 1988

Before WISDOM, GEE and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The issue is whether the guarantee of equal protection of the laws forbids the exercise of peremptory challenges on racial grounds by a private litigant in the trial of a civil case in federal district court. We hold that it does, thus extending the principle announced by the Supreme Court in *Batson v. Kentucky*.[1]

I.

Injured in an accident on a construction job at Fort Polk, Louisiana, a federal enclave, Thaddeus Donald Ed-

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[1] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

monson, a 34-year-old black male, sued Leesville Concrete Company for negligence in federal district court.[2] The case was tried to a jury.

Edmonson used all three of his peremptory challenges to excuse members of the venire who were white. Leesville challenged peremptorily two prospective jurors who were black and one who was white. Citing *Batson*, Edmonson asked the district court to require Leesville to articulate a neutral explanation for the manner in which it had exercised its challenges. The district court denied the request on the ground that the *Batson* ruling did not apply to civil proceedings, and then proceeded to impanel a jury composed of eleven white jurors and one black juror. The jury rendered a verdict for Edmonson, assessing his total damages at $90,000, but because it found him 80% contributorily negligent, awarded him only $18,000. Edmonson seeks a new trial because of Leesville's alleged racial discrimination in its exercise of peremptory challenges.

II.

In *Batson*, the Supreme Court held that the equal protection clause of the Fourteenth Amendment forbids the prosecutor in a state criminal action to exercise peremptory challenges to remove members of the defendant's race from the venire. A defendant in such a case, the Court noted, may establish a prima facie case of purposeful discrimination in the selection of the petit jury "solely on evidence concerning the prosecutor's exercise of peremptory challenges" at the trial.[3] To do so, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of his race from the venire. Second, the defendant may rely on the indisputable fact that "peremptory challenges constitute a jury

[2] 28 U.S.C. § 1331.

[3] 476 U.S. at 94-8, 106 S.Ct. at 1722-23.

selection practice that permits 'those to discriminate who are of a mind to discriminate.' "[4] Finally, the defendant must show that these facts and any other relevant circumstances "raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[5] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. The Court stated, "We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors."[6]

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[7] After receiving the State's explanation, the trial court "will have the duty to determine if the defendant has established purposeful discrimination."[8]

While *Batson* was based on the equal protection clause of the Fourteenth Amendment, which applies only to the states, and the Constitution contains no equivalent express provision concerning federal governmental action, the due process clause of the Fifth Amendment, which applies to federal action, implies a like guarantee against the denial of equal protection of the laws by the federal government.[9] We must initially determine, therefore, whether

[4] *Id.*, 476 U.S. at 96, 106 S.Ct. at 1723 (citing *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)).

[5] *Id.*, 476 U.S. at 96-8, 106 S.Ct. at 1723.

[6] *Ibid.*

[7] *Ibid.*

[8] *Id.*, 476 U.S. at 96-9, 106 S.Ct. at 1723-24.

[9] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *United States v. Hawes*, 529 F.2d 472 (5th Cir.1976).

the exercise of peremptory challenges by a private litigant in a civil action pending in federal court is a government action, to which the Fifth Amendment applies, or a private action, which the Constitution does not reach. If the action is governmental in nature, we must then decide whether to extend the principle underlying *Batson* to civil cases.

III.

The equal protection guarantee does not forbid discrimination by private persons. As the level of interaction and cooperation between private individuals and the state arises, however, it becomes increasingly difficult to discern precisely where private conduct ends and state action begins.[10] The Court has said, in *Burton v. Wilmington Parking Authority*,[11] "[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." The criterion, the Court later stated in *Moose Lodge No. 107 v. Irvis*,[12] is whether the government has "'significantly involved itself with invidious discriminations.'"

In *Lugar v. Edmondson Oil Co.*,[13] the Court formulated more precisely its inquiry into state action: "[T]he

[10] *See* Brest and Levinson, Processes of Constitutional Decisionmaking at 821 (2d ed. 1982); Black, "State Action," Equal Protection and California's Proposition 14, 81 Harv.L.Rev. 69 (1967).

[11] 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961) (citations omitted).

[12] 407 U.S. 163, 173, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972) (citing *Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830 (1967)); *see also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

[13] 457 U.S. 922, 939, 102 S.Ct. 2744, 2755, 73 L.Ed.2d 482 (1982).

first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." The "second question," *Lugar* stated, it whether, under the facts of the case, the private persons "may be appropriately characterized as 'state actors.'"[14] That requirement was met in *Lugar* because "a private party's joint participation with state officials . . . is sufficient to characterize that party as a 'state actor' . . . ."[15]

In a number of other cases the Court has traced the line that separates private from governmental action.

Shelley v. Kraemer[16] established that the equal protection clause forbids judicial enforcement of restrictive covenants based on race. Despite the fact that a restrictive covenant is a contractual arrangement between private parties, the Supreme Court held that enforcement of such private agreements by "judicial officers in their official capacities is to be regarded as action of the State."[17] Confronted by overlapping relationships between public and private actors, the Supreme Court in *Shelley* recognized that governmental action triggered by a private litigant retains its official character. Thus, the Court held in *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*,[18] state-appointed trustees may not enforce a provision in a will setting up a school for "poor white male orphans" by denying admission to a non-white person.

In *Tulsa Professional Collection Services v. Pope*,[19] the Court held that the state acts when "private parties make

[14] *Ibid.*

[15] *Id.*, 457 U.S. at 941, 102 S.Ct. at 2756.

[16] 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

[17] *Id.*, 334 U.S. at 14, 68 S.Ct. at 842.

[18] 353 U.S. 230, 231, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957).

[19] —— U.S. ——, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988).

use of state procedures with the overt, significant assistance of state officials," as was the case when the executrix of an estate denied a claim made under a state nonclaim statute that became operative only after probate proceedings had been commenced. In that situation, the time bar was not self-executing; the "probate court is ultimately involved throughout, and without that involvement the time bar is never activated." [20]

In *Burton v. Wilmington Parking Authority*, the Court held that the exclusion of a black would-be patron from a restaurant located in a state-owned and operated parking facility was state action even though the decision to do so was made by the restaurant operator, a private concern. The state "effectively abdicate[d] its responsibilities," the Court held, by failing to censure racial discrimination occurring on its property, a duty that the state cannot "ignor[e]" or "fail[] to discharge[,] . . . whatever the motive." [21]

28 U.S.C. § 1870 provides, "In civil cases, each party shall be entitled to three peremptory challenges." If the Congress had the poor judgment to enact a statute declaring, "Peremptory challenges may be used to excuse jurors on the basis of their race," there would be little doubt that the statute would be unconstitutional. This conclusion ineluctably follows from the decision in *Reitman v. Mulkey*,[22] in which the Supreme Court held unconstitutional California Proposition 14, an amendment to the State constitution permitting any person to decline to sell or lease property to another person "as he, in his absolute discretion, chooses," By adopting this amendment, the Supreme Court held, the state affirmatively sanctioned private discrimination as one of its basic policies. Interpreting 28 U.S.C. § 1870 to allow the exclu-

[20] *Ibid.*

[21] 365 U.S. at 725, 81 S.Ct. at 861.

[22] 387 U.S. at 371, 87 S.Ct. at 1629.

sion of jurors because of their race would condone conduct that could not be explicitly allowed.

That the statutory right to challenge jurors is exercised by a private litigant does not of itself make the action private. The government is intimately involved in the process by which a litigant challenges a prospective juror: the government summons the venire to appear in court at a particular time and place; the right to peremptory challenges is granted by a federal statute; the challenges are invoked in the course of a judicial proceeding, and on a facility operated by the government, usually in a federal courtroom or, for convenience, in the judge's chambers; they are not self-executing but are effected by the action of the judge; and the judge as government official acts in a court required by the Constitution to be open to the public which may thereby observe the court's toleration of the practice. The litigant exercises the peremptory challenge, but it is the judge, acting in a judicial capacity, who excuses the prospective juror.

Judicial oversight and administration of peremptory challenges thus involve more judicial process and government action than the amount found sufficient by the Supreme Court in *Lugar*, *Shelley*, *Tulsa Professional Collection Services*, and *Burton* to trigger state action. The Constitution that forbids judicial enforcement of covenants based on race equally prohibits judicial enforcement of peremptory challenges so motivated. The Constitution that forbids private parties to discriminate based on race through the use of a state nonclaim statute equally prohibits private parties from so discriminating through the use of a federal peremptory challenge statute. The Constitution that forbids a private restaurant on state-owned property to discriminate based on race equally prohibits a private party in a federal courtroom from so discriminating.

Responsible for impanelling the jury, the court, and hence, "the State[,] is not merely an observer of the

discrimination, but a significant participant. . . . The only thing the State does not do is make the decision to discriminate. Everything else is done or supplied by the State," [23] a New York state judge observed. By presiding over jury selection in his official, governmental capacity, a judge is intimately involved in the process that Tocqueville termed America's "greatest advantage" in "rub-[bing] off th[e] private selfishness which is the rust of society." [24] By carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval.

Justice would indeed be blind if it failed to recognize that the federal court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race. The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, "Ms. X, you are excused." A litigant's decision to provoke the court's action by virtue of a statutorily accorded right does not disguise the official governmental character of the procedure as a whole.

IV.

There are manifest differences between the nature of a criminal prosecution and a civil action, and the degree of governmental involvement in each. In a criminal prosecution, the government, state or federal, initiates the proceeding against an unwilling defendant. The government is the prosecutor, and the full weight of the state's panoply of personnel and resources is brought to

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[23] *People v. Gary M*, 138 Misc.2d 1081, 526 N.Y.S.2d 986, 994 (1988).

[24] Tocqueville, Democracy in America (Vintage Books: 1831/1945) Vol. I., 295-96.

bear against the accused. In a civil matter to which the state is not a party, the plaintiff initiates the proceeding and private parties are matched against each other. The state provides but the forum and the rules.

Neither the equal protection clause nor the rationale of the *Batson* case, however, is limited to the state's involvement in criminal prosecutions. The principle of equal protection applies to governmental action in civil as well as criminal matters, federal as well as state.[25] While the Supreme Court in *Batson* considered only a defendant in a criminal case, its guiding precept is that a " 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.' " [26] The "central concern of the Fourteenth Amendment" the Court affirmed, "was to put an end to governmental discrimination on account of race." [27]

The *Batson* court's holding that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure" [28] applies to civil no less than criminal proceedings. The *Batson* court itself provides the explanation: "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try," [29] or, we add, the private litigant whose dispute they are called to adjudicate. "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impar-

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[25] *Bolling v. Sharp, supra*, n. 9.

[26] *Batson*, 476 U.S. at 84, 106 S.Ct. at 1716, quoting *Swain v. Alabama*, 380 U.S. 202, 203-204 85 S.Ct. 824, 826-27, 13 L.Ed.2d 759 (1965), and citing as authority at n. 3 14 other Supreme Court decisions.

[27] *Id.*, 476 U.S. at 84, 106 S.Ct. at 1716.

[28] *Ibid.*

[29] *Id.*, 476 U.S. at 85, 106 S.Ct. at 1717.

tially to consider evidence presented at a trial. A person's race simply 'is unrelated to his fitness as a juror' . . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." [30]

The peremptory challenge occupies as important a position in the trial procedure of civil as it does in the procedure of criminal cases. Racial prejudice has no more place in the federal courtroom on the days the court is conducting a civil trial than it does on the days when the same judge, seated at the same bench, in the same courtroom, is conducting a criminal trial.[31]

Three federal courts have considered the applicability of *Batson* to civil proceedings. The Eighth Circuit Court of Appeals expressed "strong doubts" that *Batson* is limited to criminal cases, yet left the question for another day.[32] In *Esposito v. Buonome*,[33] a district court case, Circuit Judge Meskill, sitting by designation, held that *Batson* was not controlling in a § 1983 action, citing the distinction between civil and criminal cases without expressly deciding whether the exercise of peremptory challenges in a civil case involves governmental action. The court's reasons for distinguishing *Batson*, however, suggest that the decision was based on Judge Meskill's conclusion that the litigant had not demonstrated governmental action.

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[30] *Id.*, 476 U.S. at 85-9, 106 S.Ct. at 1717-18 (citations and portions of text omitted).

[31] *See Maloney v. Washington*, 690 F.Supp. 687, N.D.Ill., Memorandum Opinion, vacated on other grounds, *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir.1988).

[32] *Wilson v. Cross*, 845 F.2d 163, 164 (8th Cir.1988).

[33] 642 F.Supp. 760 (D.Conn.1986).

A district judge in the same district court, however, reached the opposite result in *Clark v. City of Bridgeport*,[34] holding that "the equal protection analysis enunciated in *Batson* pertaining to use of peremptory challenges applies not only to criminal cases but also to civil cases" [35] in which a state agency is a party and an assistant city attorney exercises the peremptory challenge on behalf of a city.

If we were to limit *Batson* to criminal cases, we would betray *Batson's* fundamental principle: the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause. We, therefore, hold that the principle announced by the Supreme Court in *Batson* applies to civil cases as well.

V.

As the Court observed with regard to the award of child custody in *Palmore v. Sidoti*,[36] "[I]t would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated." Judges do not inhabit an ivory tower. Like others, we know that some members of any racial group acting as decision-makers in a dispute between a person of their own race and a person belonging to another race may tend to favor those who are like themselves over those who are different. This is prejudice, and that humans are prejudiced, however unworthy that emotion, cannot be denied.

In a contest, therefore, between persons of different races, advocates may have a strategic reason to seek the discharge of veniremen of the opposing litigant's race. The potential pervasiveness of racial prejudice and its influence on advocates' efforts to find a favorable audience is evinced by Edmonson himself who exercised,

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[34] 645 F.Supp. 890 (D.Conn.1986).

[35] *Id.*, 645 F.Supp. at 896.

[36] 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984).

without objection from Leesville, all of his challenges against white jurors. The Constitution, however, condones neither the possible prejudice nor the equally racially-motivated attempt to escape presumed prejudice, which is itself a form of stereotyping. "The Constitution cannot control such prejudices but neither can it tolerate them," the Supreme Court stated in *Palmore*. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[37] If racially-motivated challenges are exercised by both parties, the remedy is not to condone them but to insist, when objection is made, that the guarantee of equal protection against all racial prejudice is enforced.

Our holding does not convert the right to exercise a peremptory challenge into a requirement that it be for cause. The peremptory challenge, as its very name implies, may be exercised for no reason at all, or for any reason, however capricious or whimsical, save to violate the Fourteenth Amendment: it may not be exercised to exclude a prospective juror because of race.

VI.

As we have noted, Edmonson established that he is a member of a cognizable racial group and that Leesville exercised peremptory challenges to remove members of his race from the venire. Leesville seeks to avoid the inference of discrimination by asserting that it did not challenge one black person who did indeed sit on the jury. That one black person was acceptable to Leesville does not negate the possible inference that Leesville used two of its three challenges to remove black jurors because of their race in order to try its case before a jury with eleven white members.[38]

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[37] *Ibid.*

[38] *See United States v. Battle*, 836 F.2d 1084, 1085-86 (8th Cir. 1987); *United States v. Clemons*, 843 F.2d 741, 746 (3d Cir.1988); *Stanley v. Maryland*, No. 82-1987 (Md.Ct.App.1988); *State v. Brinkley*, 42 Cr.L., 2145, 48 (Md.Ct.App.W.Dist.1987). *But see State v. Vincent*, 42 Cr.L. 2277 (Md.Ct.App.E.Dist.1988).

Whether or not Edmonson has established a prima facie case of racial discrimination, however, is a question for the district court in the first instance. The district court stated that it observed "no discrimination, no violation of the law in the selection *procedure*."[39] Reading this statement in context, we do not find that the district court determined, as *Batson* requires, whether, under the specific circumstances, Edmonson had established a prima facie case. We follow *Batson's* lead, and remand the case for further proceedings. If Edmonson should establish a prima facie case, then the district court must require Leesville to show that it had some neutral, that is, non-racial, reason for its challenges. If Leesville does not then come forward with a neutral explanation for its action, the district court shall order a new trial.

The case is REMANDED for further proceedings consistent with this opinion.

GEE, Circuit Judge, dissenting:

The sweeping result in today's case seems to me so unfortunate that I cannot join in it, even though the most dubious features of the majority opinion derive, not from the reasoning of my brethren, but from earlier decisions of the Supreme Court. Indeed, it may be arguable that—given those decisions—this result is unavoidable. Even so, because its effect is to impair severely the utility of a venerable and useful procedural device, for reasons that seem to me misguided, I voice a brief dissent. Long writing seems needless in any event, since it is unlikely that the Court will leave such an issue as this dangling.

The first subsidiary issue posed by the majority in the body of the opinion is "whether the exercise of peremptory challenges by a private litigant in a civil action

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[39] Trial Transcript at 61 (emphasis added.)

pending in federal court is a government action." (Ms. op. 4). One would think that to state the issue in this manner would be to answer it: unlike the prosecutor in *Batson*,[1] counsel in this case and his client are private parties, as are their adversaries, and the court took no part beyond permitting venire members dismissed by counsel to depart. Under the two-part test enunciated by the Court in *Lugar*,[2] however, it would be difficult to maintain that the strikes exercised by counsel in this case did not constitute "the exercise of a right or privilege having its source in state authority." 457 U.S. at 939, 102 S.Ct. at 2755.

It seems far more doubtful, however, that the second prong of the test is satisfied: that private counsel, striking the venire in a civil case, is a "state actor." *Ibid.* Indeed, if a public defender employed by the state is not such an actor, as the Supreme Court held in *Polk County v. Dodson*,[3] it seems clear that privately-retained counsel is not. This leaves as the requisite state actor only the trial judge, who performs the merely ministerial function of excusing the veniremen cut by counsel from further attendance in the case. It is difficult to conceive of a more minimal involvement than this—one which requires the exercise of no judgment or discretion, one which consists of nothing more than permitting the excused to depart. I would not hold that this mere standing aside constitutes "action," especially in view of such Supreme Court pronouncements as that found in *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982), that "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed that

[1] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[2] *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

[3] 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

of the state" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the . . . Fourteenth Amendment."

In *Batson*, the state actor was the prosecuting attorney, the very embodiment of the state, exercising its power and acting in its interest in all respects. In today's case, no such figure is to be found: only private counsel, who holds no state post, and the trial judge, who took no action of any significance. I would not find state action here.

Nor can I agree that exercising strikes in a given case along ethnic lines necessarily involves or gives the appearance of involving derogatory racial views, as does the attempt to exclude black jurors generally from the venire. As Judge Garwood explained for our en banc Court, in a celebrated passage quoted by then Chief Justice Burger in his *Batson* dissent:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try any case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed litigants in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that particular case than others on the same venire.
>
> "Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclu-

> sion bespeaks a priori across-the-board unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not."

United States v. Leslie, 783 F.2d 541, 554 (5th Cir.1986) (en banc), quoted at 476 U.S. 79, 122-23, 106 S.Ct. 1712, 1736-37, 90 L.Ed.2d 69 (1986).

Finally, I am unable to avoid the conclusion that first the Supreme Court, with its decision in *Batson*, and now our panel, with today's case, have leapt halfway across a logical chasm and come to rest in midair. The essence of a peremptory challenge is that it need not be excused or justified; indeed, the challenger himself may *have* no articulable reason for his action. Every lawyer who has tried cases for any length of time knows this, would be forced to admit, if pressed, that on occasion he has exercised strikes on no firmer basis than "I didn't like the way he looked at my client" or "Her tone of voice didn't sound right." Hunches, implicit feelings, even crochets—some always strike barbers, or housepainters, or ironworkers—are the stuff of peremptory challenges. But who would credit such a reason, if advanced as the basis for challenging a member of an ethnic minority? Nor does equal opportunity for members of the various ethnic groups to serve as jurors result from today's decision, rather the contrary; for counsel may well think twice about lodging a challenge for which he must possess (or invent) suitable, rational reasons, as opposed to one for which he need produce none.

What remains after today's holding is not the peremptory challenge which our procedure has known for dec-

ades—or not one which can be freely exercised against all jurors in all cases, at any rate. Justice Marshall would dispense with strikes entirely, and perhaps this will be the final outcome. *Batson*, 476 U.S. at 106-8, 106 S.Ct. at 1728-9 (Marshall, J., concurring). In this much at least he is surely correct, that we must go on or backward; to stay here is to rest content with a strange procedural creature indeed: a challenge for semi-cause, exercisable differentially as to jurors depending on how the ethnic group to which they belong correlates with that of the striker's client—a skewed and curious device, exercisable without giving reasons in some cases but not in others, all depending on race.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4804

(Title Omitted in Printing)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion December 5, 1988, 5 Cir., 1988, —— F.2d ——)

(January 23, 1989)

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, and DUHE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted in Printing)

Before CLARK, Chief Judge, WISDOM, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

March 1, 1990

Issued as Mandate: Mar. 23, 1990

Judges Politz and Higginbotham specially concur. Judge King concurs in the result. Judges Wisdom, Rubin, Johnson and Williams dissent.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

(Title Omitted in Printing)

March 1, 1990

Before CLARK, Chief Judge, WISDOM, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.[1]

GEE, Circuit Judge:

Today we decide whether a private litigant in a federal civil case who challenges a venire member peremptorily can be made to give reasons for his action. Specifically, we must determine whether he can be required to do so when his opposing party is a black person and the venireman stricken is black, so as to rebut the inference that he exercised the strike because of the would-be juror's ethnic group.

The Supreme Court has imposed such a requirement in criminal prosecutions of black defendants, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); and in partial reliance on that decision a panel of our court has extended the principle to this civil damage suit by reversing the trial court, which had held that such a rule does not obtain a civil litigation. *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir.

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[1] Senior Judges Wisdom and Rubin were members of the original panel and sit on the en banc court for that reason, Judge Rubin having assumed senior status since the panel opinion was handed down.

1988). We now reconsider that decision en banc and affirm the trial court.

We do so for two reasons: the mechanical one, that state action is not present in such a case as this; and the logical one, that striking a venireman in a civil case because you fear he may tend to favor your opponent over you neither demeans him nor calls in question the fairness of the civil justice system.

Facts

The panel opinion states the relevant facts succinctly:

> Injured in an accident on a construction job at Fort Polk, Louisiana, a federal enclave, Thaddeus Donald Edmonson, a 34-year-old black male, sued Leesville Concrete Company for negligence in federal district court. The case was tried to a jury.
>
> Edmonson used all three of his peremptory challenges to excuse members of the venire who were white. Leesville challenged peremptorily two prospective jurors who were black and one who was white. Citing *Batson*, Edmonson asked the district court to require Leesville to articulate a neutral explanation for the manner in which it had exercised its challenges. The district court denied the request on the ground that the *Batson* ruling did not apply to civil proceedings, and then proceeded to impanel a jury composed of eleven white jurors and one black juror. The jury rendered a verdict for Edmonson, assessing his total damages at $90,000, but because it found him 80% contributorily negligent, awarded him only $18,000. Edmonson seeks a new trial because of Leesville's alleged racial discrimination in its exercise of peremptory challenges.

Id. at 1309-10 (footnote deleted).

The Peremptory Challenge: 1066 A.D. through Swain

The history of the peremptory challenge in felony cases stretches back many hundreds of years to the roots of the common law. That history, both in England and in our Country, is reviewed with painstaking thoroughness by Justice White in his opinion for the Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). To his account we neither can nor need add anything; we merely repeat his relevant conclusions here for the reader's convenience:

(1) "The use of peremptory challenges is of ancient origin and is given in aid of the party's interest in having a fair and impartial jury." Wright & Miller, Federal Practice & Procedures: Civil § 2483, at 473 (citing to *Swain*, 380 U.S. 202, 217, 85 S.Ct. 824, 834, 13 L.Ed.2d 759 (1965).

(2) "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another. . . .' It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." 380 U.S. at 220, 85 S.Ct. at 835.

(3) "The presumption [that the prosecutor is using the State's challenges to obtain a fair and impartial jury] is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand, all Negroes were removed from the jury *or that they were removed because they were Negroes. Any other result,*

we think, would establish a rule wholly at odds with the peremptory challenge system as we know it." 380 U.S. at 222, 85 S.Ct. at 836 (emphasis added).

(4) Where, however, it is shown that peremptories are being used to serve the purpose of generally disqualifying blacks as jurors on a racial basis, relief can be had.

A vigorous dissent, written by Justice Goldberg and joined by Chief Justice Warren and Justice Douglas, would have extended the holding of *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), to cover the situation presented by *Swain*, taking the view that a sufficient showing had been made that the strikes in question were exercised, not with reference to the outcome in the particular case, but for the purpose of denying to black citizens the same right to participate in the administration of justice as whites enjoyed.[2] 380 U.S., at 229, 85 S.Ct. at 840 *et seq.; see also United States v. Leslie*, 783 F.2d 541, 545-46 (5th Cir. 1986) (en banc), vacated and remanded, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987).

And so matters rested for twenty years. During these, the Equal Protection Clause was thought to bar any general or systematic disqualification of black citizens as veniremen on any notion of supposed incapacity or inferiority, but—as *Swain* explicitly noted—to permit them to be cut from a jury panel by peremptory challenge for any reason or for no reason, just as any other person might be struck. In essence, the peremptory could be exercised on any ground whatever, including race, that was directed and limited to seeking a given result in a particular case. Only when the challenge could be shown to have been employed as a device to eliminate blacks

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[2] *Strauder* invalidated a state law limiting eligibility for jury service to white males.

from jury service generally was it vulnerable to constitutional attack under *Swain*.

Batson

A little over three years ago, in *Batson v. Kentucky*, *supra*, the Court acted for the first time seriously to trammel the use of the peremptory challenge to strike black veniremen in the criminal prosecution of a black.[3] James Batson, a black male, was indicted for burglary and receiving stolen goods. Because the prosecutor struck all four black persons on the venire, Batson was tried by an all-white jury and convicted. His Sixth and Fourteenth Amendment objections unavailing, he sought and got relief from the Supreme Court. The form which it took, however, was a reaffirmation of the root principle of *Swain*—that systematic exclusion of black jurors from trying black defendants in criminal cases infringes the rights of both—but a revision to lighten the evidentiary burden announced in *Swain*.

Justice Powell's opinion in *Batson* therefore observes that "[a] number of lower courts following the teaching of Swain reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause."[4] 476 U.S., at 92, 106 S.Ct., at 172. (footnote deleted). Disapproving this very high standard of proof, which by hindsight it correctly characterized as "a crippling burden"[5], the

[3] The Court's citation to *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) implies, however, and the general wording and tone of *Batson* further indicate, that the ruling is not limited to black citizens.

[4] With deference, this is scarcely surprising in view of the presence in *Swain* of such statements as "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 380 U.S., at 221, 85 S.Ct., at 836.

[5] For essentially the reasons set out by our Court in *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir.1971).

Court laid out a less demanding, two-step process of proof. First, a prima facie showing by the defendant of discrimination against veniremen of his race; second, a coming forward by the state with a neutral explanation for each of its peremptory challenges to veniremen of that race. The Court is at pains, moreover, to make plain that an assumption of partiality on the mere basis of shared race will not do as such an explanation.[6] 476 U.S., at 97, 106 S.Ct., at 1723. Thus the law of strikes in criminal cases. Should it be extended to civil ones?

State Action?

This issue is accurately stated by our panel as: "[W]hether the exercise of peremptory challenges by a private litigant in a civil action pending in federal court is a government action, to which the Fifth Amendment

[6] There are at least two reasons why a prosecutor might strike a black venireman called in the prosecution of a black defendant: the notion that black citizens are inherently unfit to serve as jurors, as per the statute invalidated in *Strauder*, or a belief that a black person may tend to favor members of his own ethnic group. The former is demeaning; the latter is not—although a belief in such a proposition is almost surely irrational, in view of the common knowledge that in our nation blacks both commit and suffer disproportionately from criminal violence. Thus, it seems plain, the law-abiding black citizen is scarcely likely to be indulgent toward *any* criminal, black or white—rather the contrary. See Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545, 553-54 (1974-75).

At all events, the *Batson* Court appears to have concluded that since the latter, undemeaning reason for challenge cannot in practice be separated from the former, neither can be countenanced. Clearly, the reasoning supporting the Court's new posture on proof of race discrimination in jury strikes would apply equally to strikes based on religious affiliation, nationality, and the like. Equally clearly, such an extension would likely complicate the process of exercising peremptory challenges to such an extent that issues arising from it would at last wag those of guilt or innoence, thus effectively spelling the end of strikes in criminal cases. Indeed, Justice Marshall, in a separate concurrence, contends for just such a result. 476 U.S., at 107-8, 106 S.Ct., at 1728-9.

applies, or a private action, which the Constitution does not reach." 860 F.2d, at 1310. The answer to it is dispositive of the appeal; for if governmental action is not present, then the courts hold no warrant to interfere, in the name of equal protection, with the system of civil peremptory challenges.[7]

Our inquiry is assisted by the two-step test laid down by the Supreme Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982), for assaying the presence or absence of state action. The first requirement is clearly present here: that the claimed deprivation has resulted from the exercise of a right or privilege having its source in governmental authority. The second, however, seems equally clearly to be wanting: the presence of some figure who can fairly be characterized as a state actor.

In *Batson*, no such doubt arose: there the entire proceeding was commenced and carried through by the prosecuting attorney, the very embodiment of the state's power, acting in the direct interest of its most fundamental function, maintaining law and order. In today's case, no such figure is present; and only two conceivable candidates present themselves: the trial judge and the private defendant's trial attorney.

The notion of trial judge as "state actor" need not detain us long. In the first place, as the Supreme Court observed in *Swain*—factually and not in such a manner as to be subject to overruling by *Batson*—the peremptory challenge "is one exercised . . . without being subject to the court's control. . . ." 380 U.S., at 220, 85 S.Ct., at 835. The merely ministerial function exercised by the judge in simply permitting the venire members cut by

[7] Indeed, as Part II of the panel opinion correctly notes, the Constitution says nothing of equal protection as regards acts of the federal government. The Supreme Court has, however, repaired this omission by implication. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined.[8] No exercise of judicial discretion is involved, rather a mere standing aside; so that the fault—if it is a fault—lies with the system which permits such challenges, not with the judge's mere ministerial compliance with what the rule requires.[9] Finally, it is hard to see how the Supreme Court could have reserved judgment, as it purported to do in *Batson*, on the strikes by defense counsel, if the "actor" was the judge. 476 U.S., at 89 n. 12, 106 S.Ct., at 1719 n. 12. If the judge is the actor, then, and if his mere excusing of veniremen who have been peremptorily challenged from further attendance at court be deemed an "act," it follows that every aspect of every civil trial, state and federal, is constitutionalized—a quantum pro-

[8] To hold that this constitutes "action" would require our disregarding expressions of the Court such as that found in *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982), that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed to be that of the State" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible . . . under the . . . Fourteenth Amendment." (citations omitted). See also *Evans v. Abney*, 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970) (giving indirect effect to private person's discriminatory intent not state action for equal protection purposes.)

[9] An example of such a system, which, as it involves the state itself requires the presence of no "state actor," is to be found in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), invalidating state replevin laws as violating due process for want of a hearing before chattels could be repossessed. Such a legal system, if used at all in the manner specified by the state, would necessarily involve unconstitutional actions. The system of peremptory challenges, by contrast, specifies no unconstitutional actions but is at most—and like most systems—subject to improper use by one disposed to do so. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1722.

cedural leap that we leave for the Supreme Court to make, should it wish to do so.

As for private counsel, it is inconceivable to us that a privately-retained lawyer, serving a private client in a damage suit such as this, should be viewed as a state actor.[10] Clearly he cannot be, at any rate, so long as the 1981 Supreme Court holding stands that even a public defender, paid by the state, in a criminal proceeding against an indigent defendant is not. *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). Nor, common sense tells us, does private counsel partake of such a character. True, he is licensed by the State; not, however, for its benefit but in the hope of insuring a minimum degree of competence to his clients. Like the public defender, it is *their* interests, their partisan interests, which he serves; and where their proper and lawful interests and those of the State come into conflict, he hews to those of his client in every instance—and properly so. Nor is the interest of the state by any measure so deeply involved in civil litigation between private parties in its own courts as in criminal litigation there: in the former case it simply furnishes a level playing field for dispute resolution in the name of civic peace, in the latter it is the instigator and actor, with powerful interests of its own at stake. Nor can it be said that private counsel in a civil damage suit performs a "public function." [11]

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[10] We have no occasion to consider the situation presented where the state appears as a civil litigant.

[11] See *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). In *Terry*, the Supreme Court held the Jaybird party, a private political organization which excluded blacks from its nomination balloting, to be a state actor. Although the jury selection process, like the election process, involves both private and state action, the traditional roles of private counsel and the state have remained discrete in this case. The present situation is thus distinguishable from that in *Terry*, in which the nomination process of the Jaybird party was found to be "an integral part, indeed the only effective part, of the [entire] elective process." *Id.* at 469, 73 S.Ct. at 813.

And so, since it appears to us that no state actor is present on the scene of today's case, we conclude that Constitutional considerations are not implicated. So much for the mechanical application of precedent; we turn in closing to a few underlying considerations of logic and policy.

Strikes in Practice

A function of strikes is to allow the parties to participate to some degree in the selection of the jury that is to try their case, to the end that each may not only have, but perceive that he has had, a fair and impartial trial. It is certainly maintainable that this function is of greater significance in federal court proceedings than in most, for there the attorney's role in jury selection is perhaps at its nadir among American jurisdictions. Ordinarily, for example, counsel does not there address the venire; and his other functions are correspondingly reduced in this aspect of trial.

It is proverbial that strikes are exercised on diverse bases: to remove the venireman whom counsel thinks the court should have excused for cause or, occasionally, in the case where counsel is allowed to interrogate the venire, the venireman whom he perceives that he has seriously offended by his questions. But even more tenuously, strikes are exercised to excuse anyone who simply did not sit right with counsel ("I didn't like the way she looked at my client"), or whom he feels might for *any* reason have a predisposition toward the other side, or an aversion to his own. The literature on this subject, it being one familiar only to trial lawyers—a group not noted for its special devotion to scholarly writing—is sparse, but see Sutin, The Exercise of Challenges, 44 F.R.D. 286 (1967); Babcock, Voir Dire; Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545 (1975). At any

rate, every lawyer with substantial trial experience knows that he has often exercised strikes for which he could articulate no clear reason even to himself, but which he desperately wished to exercise. And at all events, a procedural device of such great age and broad acceptance as the civil peremptory challenge should require little defense: clearly, for a long time, and in jurisdiction after jurisdiction, it has been found to serve useful purposes. We should therefore avoid tampering with its essential feature, the absence of a requirement to give reasons for its use, unless either the reasoning or the authority of *Batson* requires that we do so. Because, despite their superficial similarity, the true contexts of the criminal prosecution and the civil trial are greatly different, we conclude that neither does.

To begin with, and as we note briefly above, the government is directly involved in the criminal prosecution, appearing in the person of one of its central figures, the prosecutor—without whose will it cannot be brought and upon whose performance as its central actor all depends. His role has no counterpart in civil litigation, for in this respect his will *is* the will of the State. But, more fundamentally, the entire purpose of a criminal prosecution is to enforce the purposes of the state, whereas the state has no purpose at all in civil litigation beyond preempting the use of private force to settle disputes—a purpose that is as well served, if the parties consent, by an arbitration to which the state is no party. Finally, in a criminal prosecution the jury serves in some real sense as, not only a safeguard against, but an instrument of, the state's power. Once invoked, its collective will is sovereign as to guilt or innocence and, sometimes, even as to life or death. For these reasons, we do not believe that a court proceeding so cautiously as did the Batson court, one which was careful to point out that its holding did not extend even to the exercising of peremptories by defense counsel in a criminal case, would have intended by

that decision's authority to dictate our result today. 476 U.S., at 89 n. 12, 106 S.Ct., at 1719 n. 12.

Nor do we think that the Court's reasoning does so. As we have observed above, Justice Powell's opinion in *Batson* expressly states that its scope is limited to a reexamination of "that portion of Swain . . . concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race" from the jury. 476 U.S., at 82, 106 S.Ct., at 1714 (citation omitted).[12] In all other respects, *Batson* simply reaffirms *Swain*'s holding that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 476 U.S., at 84, 106 S.Ct., at 1716, quoting *Swain*, 380 U.S., at 203-4, 85 S.Ct., at 826-7. This is, however, a far cry from the proposition advanced by Mr. Edmonson in today's case, which can fairly be stated as

> Whenever a private litigant sued for damages by a black plaintiff strikes a black venireman, he can be required to give a reason other than their common ethnicity for having done so.

For several reasons, we do not believe that the considerations underlying *Swain* or the reasoning upon which it rests support such a proposition as this.

To begin with, the informing principle of the *Strauder-Swain-Batson* line of decisions is that black citizens cannot, as a matter of Constitutional law, be barred from full participation in the administration of criminal justice as jurors. *Strauder*, of course, involved an example of the most overt of such attempts to do so: an exclusion of blacks by statute from the entire venire summons process. As Judge Garwood, writing for our en banc

[12] The Court expressed no view on Batson's Sixth Amendment arguments. 476 U.S., at 84 n. 4, 106 S.Ct. at 1716 n. 4.

court, has noted, such an exclusion is racially demeaning. *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir.1986) (en banc), vacated and remanded, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987). *Swain* and *Batson* were concerned with use by the state of peremptory challenges to accomplish the same purpose in a more roundabout way: to remove black veniremen from the case simply because they were black, the decisions differing from each other solely on the manner of proof, but agreeing in principle. And that principle, to reiterate it, is that neither directly nor indirectly can black citizens be denied the opportunity for criminal jury service on racial grounds alone. The reason underlying the principle is that the Constitution does not permit unequal treatment of citizens on the ground of race and will not entertain—because it is insulting—even the suggestion that one is unfit to discharge a civic duty for such a reason.

This is a far cry, however, from striking a black venireman for particular reasons in a particular case, even for reasons having to do with his race. To take a few examples, for obvious reasons counsel representing a defendant airline in a damage suit might well peremptorily challenge a black airline pilot who was himself on strike for higher wages against another airline. Such a challenge, based on an assumed situational animosity toward his client, clearly raises no equal protection problems, even though the venireman stricken is black. To take a closer case, however, one may well imagine that counsel defending a well-known member of the Ku Klux Klan in an action for, say, breach of contract by a white plaintiff might strike any black veniremen whom he had been unable to convince the judge to excuse for cause, not because of any notion of ethnic inferiority, but rather on the prudential ground of probable hostility, ineradicable despite the subject's best efforts. Such an action does not demean the stricken subject; it merely recognizes a probable fact of life. And finally, (arguably) today's

case: counsel, representing a party opposing a black defendant, who strikes all blacks on the venire because he fears that they *may* be inclined—even if only ever so slightly—to favor one of their own. It seems to us very plain indeed that none of these strikes has been taken on a ground which is demeaning to its object.

As for the third example given, however, in *Batson* the Supreme Court clearly stated that such a reason must not be accepted for a strike in a criminal case:

> But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. *Norris v. Alabama*, 294 US, [587] at 598-599, 79 LEd 1074, 55 SCt 579 [583-584]; see *Thompson v. United States*, 469 US 1024, 1026, 83 LEd2d 369, 105 SCt 443 [445] (1984) (Brennan, Jr., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, supra, [476 U.S.] at 86 [106 S.Ct. at 1717], 90 LEd2d, at 80, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's race.

476 U.S., at 97-98, 106 S.Ct., at 1723-1724.

Thus, by Supreme Court mandate, in the criminal prosecution of a black defendant, it is as much a violation of equal protection for the prosecutor to strike a black venire-

man because he thinks he might be more inclined than another to favor such a defendant as it is to strike him because he views him as inherently unfit for service as a juror because of his race. More to the purpose, we think, than attempting to equate the two actions described in a recognition that to countenance such an explanation for such a strike would be to return to pre-*Strauder* days and permit the prosecutor in such a case, having thought up a new set of arguments for doing so, to strike a black venireman merely because he is black. The Court's result is, therefore, explicable on practical grounds in the context of criminal prosecutions. We think it would be much less so, however, in civil actions for damages between private parties—such as this one.

In a civil suit, unlike a criminal prosecution, the state itself takes no action on its own behalf that could be viewed as exhibiting official prejudice. It is, we think, a sound policy that requires the state to conform to stricter standards and appearances in dealing with its citizens than are demanded of those citizens in their dealings with each other. As an illustration, we need look no further than Justice Sutherland's often-quoted language in *Berger v. United States:*

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, at 88, 55 S.Ct. 629, at 633, 79 L.Ed. 1314 (1935).

But more fundamentally, vastly different things are at stake in criminal trials and as regards the criminal jury than where civil trials and civil juries are concerned. The criminal jury is a central feature of the criminal justice system, where liberty and even life are at stake. It holds not only fact-finding powers but, because of the Double Jeopardy Clause, the de facto power to pardon. As to the criminal jury, then, we can see how the Court might strike the balance which it did in *Batson* between the actuality or even the appearance of racially motivated strikes and the "any reason or no reason" rule for peremptory challenges that has come down to us from the common law.

The civil jury, on the other hand, serves a fact-finding function only, and the issues before it are, generally speaking, limited to economic ones. To be sure, it is part of the civil justice system just as its criminal counterpart is part of the criminal one; but its function is far less pivotal and central even to civil litigation than that of a jury in a criminal case is to criminal justice. Private counsel, in striking such a jury, has in mind a simple imperative, far removed from that which should motivate the prosecutor.

For the prosecutor's aim is justice. He wins when justice is done and—although it is surely not the outcome he envisions—when it becomes apparent during the trial of a criminal case, a la the celebrated fictional career of Perry Mason, that the accused is innocent of the crime with which he stands charged, the prosecutor has not "lost."

It is otherwise with the civil advocate. His client is in a quarrel, and he is in a fight. The fight may be a more or less genteel one, conducted in an ethical fashion to be

sure; but it remains a fight nonetheless: one which, unless settled, will be won by one side of the contest and lost by the other. It is the first imperative of the civil advocate to see that it is his side that wins.

As with all other aspects of his case, counsel brings that proper concern to striking the jury; and, because of it, in doing so he follows one precept and one only: by all fair means, to get a jury which, given his foreknowledge of the case, he believes will in the end be more naturally disposed to favor his side of the dispute than that of his opponent. Within the limits of fair and ethical conduct, his sole concern is, quite properly, that his client gain the case. In such a context as this, we see no occasion to inquire into counsel's motives for his strikes or, at any rate, none that outweighs the value of leaving the common-law peremptory challenge system in undiminished effect. If counsel is astute, he will recognize the obvious truth that there are ordinarily more affinities between a black C.P.A. and a white C.P.A. than there are between a white C.P.A. and a white longshoreman. But even if he is obtuse, it remains that he is only a private person acting obtusely: one for whose actions the state is neither actually nor apparently accountable. That it stands aside, neither approving nor disapproving his actions, and permits him to exercise his three strikes for any reason, for no reason, or even for a bad reason does not implicate the state in his conduct.[13]

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[13] We note that even if blacks are stricken for an improper reason, the fairness of the civil justice system to the individual litigants would not be compromised. The appellant does not allege, nor could he credibly do so, that he is unable to receive fair consideration from a jury which has only one black in its ranks. Indeed, if a fair cross-section of the community were essential to the proper functioning of the jury, "we would take steps to more nearly ensure that the composition of each individual jury roughly mirrored the community's group mixture." *United States v. Leslie*, 783 F.2d 541 (5th Cir.1986), *vacated*, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987). We see no need for such action at present and do not read *Batson* as requiring it. See *Batson*, 476 U.S., at 85 n. 6, 106 S.Ct., at 1716 n. 6 ("it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society").

Finally, when the civic concerns which underlie the *Strauder* line of cases are removed or greatly lessened, as they are when we shift from service on the criminal jury to service on the civil one, it remains true that the traditional peremptory strike is a leveller of the playing field. It is exercisable against any venireman, high or low, black or white, rich or poor, and without specifying a reason. Thus the peremptory, as traditionally constituted, is a device tending more to equal treatment of all the venire than the strike as reconfigured in *Batson*, which requires counsel to possess (or invent) an articulable reason other than race for challenging a black venireman when a black defendant is being prosecuted, but none for challenging a white one. Thus while he can strike a white venireman for an honest but inarticulable reason—or for a silly one: some always strike barbers; others, housepainters—he must give a reason if he strikes a black one.[14] It is not for us to quarrel with the Supreme Court's *Batson* reconfiguration of the peremptory, but we decline to extend its strictures on this ancient right into the civil area, where the considerations on which *Batson* is based are, if present at all, far weaker than in the criminal field.

The judgment of the district court is therefore

AFFIRMED.

POLITZ, Circuit Judge, with whom PATRICK E. HIGGINBOTHAM, Circuit Judge, joins, specially concurring:

I concur in that portion of the majority opinion which concludes that there is no state action involved in the

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[14] Although it appears that an eccentric one will do. *See United States v. Romero-Reyna*, 889 F.2d 559 (5th Cir.1989) ("The P Rule").

exercise of peremptory challenges at issue in this civil action. I therefore join therein and in the affirmance of the trial court.

KING, Circuit Judge, concurs in the result.

ALVIN B. RUBIN, Circuit Judge, with whom WISDOM, JOHNSON and JERRE S. WILLIAMS, Circuit Judges, join, dissenting:

The issue before us is whether a party to a civil jury trial who has established a prima facie case that the opposing party is exercising his peremptory challenges to discriminate on the basis of race is entitled by the Constitution to require the challenger to express a reason for exercising the challenges other than racial bias and thus to explain why allowing the challenging jurors to be excused would not constitute a denial of equal protection of the laws. It is not, as the majority assumes, whether "striking *a* venireman in a civil case because you fear that *he* may tend to favor your opponent over you . . . demeans him [or] calls in question the fairness of the civil justice system." [1] It is not whether a litigant's exercise of peremptory challenges can be questioned because his lawyer likes or doesn't like the face of a prospective juror, trusts or distrusts fat people or skinny people, favors or disfavors intellectuals, prefers or disdains outdoor types.[2] It is about assuring equal protection of the laws in the face of evidence that the peremptory challenge has been used to deny that constitutional right.

Peremptory challenges were authorized and may be exercised for nearly any reason at all, or for none, for irrational as well as rational reasons. Such challenges

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[1] Majority slip opinion at 2459, at —— (emphasis added).

[2] Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U.Chi.L. Rev. 153, 200-01, 210-11 (1989).

are a vital part of trial by jury.[3] They are not, however, guaranteed any role by the Constitution,[4] and are fully subject to its dictates. *Batson v. Kentucky* [5] holds that if, in a criminal case, a prima facie showing is made that the prosecutor is exercising peremptory challenges because of the race of the challenged juror, the defendant may require the court to call on the prosecutor for an explanation so that the court may determine whether the challenges reflect the prejudice that the Fourteenth Amendment was adopted to extirpate. Nothing in the words or purpose of the equal protection clause restricts its application to criminal prosecutions. Accordingly, I would extend *Batson* to civil cases, and I respectfully dissent from the majority's refusal to do so.

I.

Batson does not permit a probe of the motive for every peremptory challenge. The defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of his race from the venire. Second, the defendant may rely on the indisputable fact that "peremptory challenges constituted a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" [6] The defendant must next show that these facts and any other relevant circumstances "raise an inference that the prosecutor used that prac-

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[3] *See Swain v. Alabama*, 380 U.S. 202, 212-20, 85 S.Ct. 824, 831-35, 13 L.Ed.2d 759 (1965).

[4] *See Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28-30, 63 L.Ed. 1154 (1919); *see also Batson v. Kentucky*, 476 U.S. 79, 91, 106 S.Ct. 1712, 1720, 90 L.Ed.2d 69 (1986) (citing *Stilson*); *Swain* 380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d 759 (1965) (same); *Holland v. Illinois*, —— U.S. ——, ——-——, 110 S.Ct. 803, 806-810, —— L.Ed.2d —— (1990) (same).

[5] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[6] 476 U.S. at 96, 106 S.Ct. at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)).

tice to exclude the veniremen from the petit jury on account of their race." [7] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. The Court expressed "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." [8]

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." [9] Although prosecutors may not rebut the defendant's case by merely claiming discrimination, alleging good faith, or stating the discriminatory judgment that black jurors would be more partial to the defendant because of his race, the explanation need not "rise to the level justifying exercise of a challenge for cause." [10] After receiving the State's explanation, the trial court "will have the duty to determine if the defendant has established purposeful discrimination." [11]

Every lawyer who has ever tried a case to a jury knows that peremptory challenges are in practice exercised for reasons that may range from suspicion that an individual venireperson may not favor one's cause to adherence to an idiosyncratic, irrational rule.[12] Federal courts are not inexperienced in evaluating action that is reprobated only if done for a specific reason but is per-

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[7] 476 U.S. at 96, 106 S.Ct. at 1723.

[8] 476 U.S. at 97, 106 S.Ct. at 1723.

[9] *Ibid.*

[10] 476 U.S. at 97-98, 106 S.Ct. at 1723-24.

[11] 476 U.S. at 98, 106 S.Ct. at 1724.

[12] *See, e.g., United States v. Romero-Reyna*, 889 F.2d 559 (5th Cir.1989) (The "P" rule).

mitted even if done for some other reason, however unfair, or for no reason at all. Thus we decide whether a state employee who has no property right in employment and is otherwise terminable at will has been discharged in retaliation for her exercise of First Amendment rights; [13] whether a private employee who is otherwise subject to discharge without cause has been fired in violation of the Age Discrimination in Employment Act; [14] and in general whether an unconstitutional or illegal purpose was a substantial factor in causing an otherwise valid action.[15]

The *Batson* test is demanding, requiring three specific steps of proof by the defendant before the challenger need utter a word and then permitting the challenger to explain if he wishes. The Supreme Court was careful to select a system of proof that steered between unfairly encouraging meritless claims and imposing a "crippling burden of proof," [16] one that courts had experienced and ably managed in a number of equal protection contexts.[17] The burden of proof of discrimination rests on the party who claims that he has been denied equal protection. Application of *Batson* to civil cases would not lead courts into a jury-selection morass, but would authorize a simple process readily administered by trial judges.[18]

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[13] *See, e.g., Perry v. Sinderman*, 408 U.S. 593, 596-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972).

[14] 29 U.S.C. § 621 *et seq; see, e.g., Trans World Airlines v. Thurston*, 469 U.S. 111, 124, 105 S.Ct. 613, 623, 83 L.Ed.2d 523 (1985).

[15] *See, e.g., Washington v. Davis*, 426 U.S. 229, 239-45, 96 S.Ct. 2040, 2047-50, 48 L.Ed.2d 597 (1976).

[16] 476 U.S. at 92, 106 S.Ct. at 1721 (citations omitted).

[17] 476 U.S. at 93-98, 106 S.Ct. at 1721-24.

[18] *Cf. Thomas v. Moore*, 866 F.2d 803, 805 (5th Cir.1989).

II.

The equal protection clause of the Fourteenth Amendment forbids "any State . . . [to] deny to any person within its jurisdiction the equal protection of the laws." [19] Plainly that clause applies to action by the government, including, by extension under the Fifth Amendment,[20] the federal government, and does not forbid private acts, absent Congressional invocation of the authority granted by Section 5 of the Fourteenth Amendment.

A.

Accordingly, the conduct allegedly causing the deprivation of a constitutional right must be "fairly attributable to the state." [21] To determine whether a deprivation is thus fairly attributable to the government, the Supreme Court in *Lugar v. Edmondson Oil Co., Inc.*, set forth a two-part test.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state [sic] or by a person for whom the State is responsible.[22]

The majority concedes, as does the defendant-appellee, that this test was met. *Lugar* continues:

> Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. With-

[19] U.S. Const. art. XIV § 1.

[20] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[21] *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482.

[22] 457 U.S. at 937, 102 S.Ct. at 2753.

> out a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.[23]

Explaining the Court's earlier decision in *Flagg Brothers, Inc. v. Brooks*,[24] the *Lugar* opinion illustrates the application of this second principle. Action by a private party pursuant to a statute "*without something more*" is not sufficient to justify a characterization of that party as a "state actor." But the " 'something more' . . . might vary with the circumstances of the case." [25] The Court referred to its own use in other cases of a number of different factors or tests in different contexts, referring to the "public function" test, the "state compulsion" test, the "nexus" test, and a "joint action" test.[26] The Court then reserved the question whether those tests are actually different in operation or are simply different ways of "characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation," [27] clearly recognizing that in either event the inquiry into the "something more" required for state action must be based on the specific facts and entire context of a given case. Concluding its summary of the law of state action for the purposes of the equal protection clause, the Court cited with approval the teaching of *Burton v. Wilmington Parking Authority* [28] that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement

[23] 457 U.S. at 937, 102 S.Ct. at 2754.

[24] 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

[25] 457 U.S. at 937, 102 S.Ct. at 2754.

[26] 457 U.S. at 937, 102 S.Ct. at 2754-55.

[27] *Ibid*

[28] 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

of the State in private conduct be attributed its true significance." [29]

Lugar itself is instructive, although the Court limited the extent of its holding [30] and considered the underlying commercial dispute as forming a private core to the conduct at issue.[31] A private creditor had alleged in an ex parte petition its belief that a debtor was disposing of or might dispose of his property in order to defeat his creditors. Acting on that petition, a clerk of the state court issued a writ of attachment that was then executed by the County Sheriff, effectively sequestering the debtor's property although it was left in his possession. The Court held that the creditor's joint participation with state officials was sufficient to characterize the creditor as a state actor for the purposes of the Fourteenth Amendment, the Court of Appeals having erred in "requir[ing] something more than invoking the aid of state officials to take advantage of state-created attachment procedures." [32]

In *Burton*, acknowledged by *Lugar* as addressing the second state-actor inquiry,[33] the Court considered the refusal of the operator-lessee of a restaurant located in a building owned by the state of Delaware to serve a black man. The restaurant's lease required that the space be used for the service of food and/or alcohol and constrained the lessee to abide by all applicable laws, but no state law or official commanded, authorized, or encouraged the lessee's discrimination. The Court found that the lessee was a state actor, as Delaware had "not only

[29] 457 U.S. at 939, 102 S.Ct. at 2755 (quoting *Burton*, 365 U.S. at 722, 81 S.Ct. at 860).

[30] 457 U.S. at 939 n. 21, 102 S.Ct. at 2755 n. 21.

[31] *See, e.g.*, 457 U.S. at 941-42, 102 S.Ct. at 2756.

[32] *Ibid.*

[33] 457 U.S. at 938 n. 19, 102 S.Ct. at 2754 n. 19.

made itself a party to the refusal of service, but ha[d] elected to place its power, property and prestige behind the admitted discrimination," thereby denying any characterization of the conduct as purely private.[34] The likeness to the exercise of racially discriminatory peremptory challenges in the marbled halls of the nation's courts need not be stressed.

Reitman v. Mulkey [35] considered what would initially appear to be a more extreme form of state authorization: a California statute that protected the absolute discretion of state property owners to refuse to sell, lease, or rent such property to any persons he might choose. The Court abided by the California Supreme Court's appraisal that the statute was intended to "authorize" private racial discrimination in the housing market.[36] No such intent can be ascribed to the origin of the statutory right to peremptory challenges. Nevertheless, if not constrained by *Batson*, the rules governing peremptory strikes vest absolute discretion in the parties. The state thereby guarantees the effect of an objection to seating an otherwise eligible juror by allowing no other to object in turn.

Notwithstanding the Supreme Court's warning in *Burton* that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted,' " [37] the majority considers today's decision to be bound by some controlling precept in the Court's previous decisions. If true, the controlling deci-

[34] 365 U.S. at 725, 81 S.Ct. at 862.

[35] 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

[36] 387 U.S. at 376, 381, 87 S.Ct. at 1631, 1634.

[37] 365 U.S. at 722, 81 S.Ct. at 860 (quoting *Kotch v. Board of River Port Pilot Com'rs*, 330 U.S. 552, 556, 67 S.Ct. 910, 912, 91 L.Ed. 1093 (1947)).

sions are uncited. *Blum v. Yaretsky* [38] described itself as "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment." [39] Moreover, the action taken failed on the first *Lugar* element, here conceded, there being no suggestion that the nursing home's decisions "were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care." [40] *Evans v. Abney*,[41] also cited by the majority, did not decide a state action question at all, but found that the state had exhibited no racially discriminatory motivation in nullifying a racially discriminatory trust and thereby removing from public use a park that under the trust could be enjoyed only by whites.[42]

B.

Our "necessarily fact-bound inquiry" [43] cannot be accomplished by attempting to cast a single state actor of undisputed stature. The majority considers and rejects in turn the candidacies of the trial judge and the private defendant's trial attorney. It rejects "[t]he merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart [as] an action so minimal in nature that one of less significance can scarcely be imagined." [44] As for the defense counsel, the majority reasons that if *Polk County v. Dodson* [45]

[38] 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).

[39] 457 U.S. at 1003, 102 S.Ct. at 2785 (citing cases).

[40] 457 U.S. at 1005, 102 S.Ct. at 2786.

[41] 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970).

[42] 396 U.S. at 445, 90 S.Ct. at 633-34.

[43] *Lugar*, 457 U.S. at 939, 102 S.Ct. at 2755.

[44] Majority slip opinion at 2462, at ——.

[45] 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

decided that a public defender was not a state actor, surely a private defender cannot be.

That a public defender does not, merely by virtue of his employment relationship with the state, act throughout the trial under color of state law, does not mean that the litigant or his lawyer may not, in a specific instance during trial, become a state actor. The rationale of *Polk County* was that "[e]xcept for the source of [the counsel's] payment," the relationship between the indigent defendant and the public defender was "identical to that existing between any other lawyer and client." [46] The public defender is entitled to professional independence and the same freedom of professional judgment as a privately retained lawyer.[47] It does not follow, as the majority assumes, that the public defender or a privately retained lawyer is never a state actor. Indeed, *Polk County* never considered the issue of state action; [48] to the extent that state action would have been lacking, as the *Lugar* Court suggested, it was because the "respondent failed to challenge any rule of conduct or decision for which the State was responsible," [49] a near-verbatim recitation of *Lugar*'s first, here conceded, element.[50]

Examination of *Polk County* suggests instead the importance of considering the challenged conduct in depth, taking into account all its actors in the context in which they act, and avoiding conclusions driven by the characterization of particular players. The exercise of peremptory challenges is not an isolated event but part of an extensive statutory process applicable alike to civil and crim-

[46] 454 U.S. at 318, 102 S.Ct. at 449.

[47] 454 U.S. at 321-22, 102 S.Ct. at 451-52.

[48] *See* 454 U.S. at 322 n. 12, 102 S.Ct. at 451-52 n. 12.

[49] *Lugar*, 457 U.S. at 935 n. 18, 102 S.Ct. at 2752-53 n. 18.

[50] 457 U.S. at 937, 102 S.Ct. at 2753.

in cases triable by jury. "It is the policy of the United States," Congress has declared, "that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service. . . ." [51] To that end, "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status." [52]

Such provisions are not merely hortatory, but represent part of an active federal scheme to eliminate the discrimination that plagued the key-man system. In order to avoid discrimination in the selection of jury venires each district court must have a plan for random jury selection.[53] Congress has prescribed in some detail the contents of the plan,[54] the preparation of a master juror wheel and the completion of juror qualification forms,[55] the determination of the qualifications for jury service,[56] and the method of selecting and summoning jury panels.[57] When the case is set for trial, potential jurors are summoned by a federal officer, the Clerk of the United States District Court, to report to the United States courthouse. They are paid a per diem fixed by statute for their service, whether selected for a jury or not, becoming at least in some sense public servants

[51] 28 U.S.C. § 1861.

[52] 28 U.S.C. § 1862.

[53] 28 U.S.C. § 1863.

[54] *Ibid.*

[55] 28 U.S.C. § 1864.

[56] 28 U.S.C. § 1865.

[57] 28 U.S.C. § 1866.

charged with important responsibilities.[58] At an appropriate time they are questioned in voir dire by a federal judge and, depending on local practice, by counsel, concerning their qualifications to sit as a juror.

The number of peremptory challenges is determined in the main by statute. In civil cases, each party is provided by statute with three peremptory challenges,[59] while in criminal cases the number varies with the charge: if the offense is capital, 20 per side; if punishable by imprisonment for more than one year, six for the government and 10 for the defendant; and if the offense is punishable less severely, three per side.[60] Nevertheless, the judge may affect every aspect of the exercise of peremptory challenges. Most plainly, the judge has broad discretion in determining the appropriate number and allocation of peremptory challenges in all multiparty cases,[61] and may even limit ten criminal codefendants to a total of ten peremptory challenges.[62]

Less directly, courts determine the impact of any given number of peremptory strikes. Local court rules control the number of jurors eventually impanelled in civil cases,[63] thereby governing the relative effectiveness

[58] Alschuler, *supra*, at 197.

[59] 28 U.S.C. § 1870.

[60] Fed.R.Crim.P. 24(b).

[61] *See* 28 U.S.C. § 1870; Fed.R.Cr.P. 24(b).

[62] *See Gradsky v. United States*, 342 F.2d 147, 152-53 (5th Cir. 1965), *vacated on other grounds sub nom. Levine v. United States*, 383 U.S. 265, 86 S.Ct. 925, 15 L.Ed.2d 737 (1966); *see also Moore v. South African Marine Corp., Ltd.*, 469 F.2d 280, 281 (5th Cir. 1972); *Carey v. Lykes Bros. Steamship Co.*, 455 F.2d 1192, 1194 (5th Cir.1972); *United States v. Williams*, 447 F.2d 894, 896-97 (5th Cir.1971); *Nehring v. Empresa Lineas Maritimas Argentinas*, 401 F.2d 767, 767-68 (5th Cir.1968), *cert. denied*, 396 U.S. 819, 90 S.Ct. 55, 24 L.Ed.2d 69 (1969).

[63] *See Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).

of peremptory challenges in determining the composition of the jury. Individual judges control the conduct of voir dire and the information that may be discovered about the venire,[64] thus affecting the exercise of both peremptory challenges and challenges for cause. Of course, by virtue of the trial judge's broad discretion over the exercise of challenges for cause,[65] he may determine the number of jurors who remain eligible for the exercise of peremptory strikes,[66] the court's own strikes,[67] or for eventual impaneling; the Supreme Court has acknowledged that a state may go so far as to require that parties use their peremptory challenges to cure erroneous refusals by the trial court to excuse potential jurors for cause.[68]

The majority's view of the court's "purely ministerial role" in supervising peremptory challenges is perhaps most strikingly belied in the trial judge's broad discretion to determine the manner in which peremptory challenges are exercised: he may decide which side exercises the last challenge,[69] may require simultaneous exercise of challenges by the prosecution and defense,[70] and may even require that one party exercise her challenges first, thereby allowing the other party to then act with full knowledge of her opponent's choices.[71]

[64] *See Rosales-Lopez v. United States*, 451 U.S. 182, 188-89, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981).

[65] *See United States v. Jones*, 712 F.2d 115, 121 (5th Cir.1983).

[66] *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976); *but see United States v. Garza*, 574 F.2d 298, 302-03 (5th Cir.1978); *Stewart v. Texas & Pacific Rwy. Co.*, 278 F.2d 676, 677-78 (5th Cir.1960).

[67] *See United States v. Calhoun*, 542 F.2d 1094, 1103 (9th Cir. 1976) (citing *United States v. Bailey*, 468 F.2d 652, 658, *aff'd on other grounds*, 480 F.2d 518 (5th Cir.1973) (en banc)), *cert. denied*, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed.2d 781 (1977).

[68] *See Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 2279, 101 L.Ed.2d 80 (1988).

[69] *See United States v. Durham*, 587 F.2d 799, 801 (5th Cir.1979).

[70] *See United States v. Sarris*, 632 F.2d 1341, 1343 (5th Cir. Unit A 1980).

Peremptory challenges are not self-executing but are effected by the action of the judge who excuses the prospective juror. The court, and hence, "the State[,] is not merely an observer of the discrimination, but a significant participant. . . . The only thing the State does not do is make the decision to discriminate. Everything else is done or supplied by the State," [72] a New York state judge has observed. By presiding over jury selection in his official, governmental capacity, a judge is intimately involved in the process that Tocqueville termed America's "greatest advantage" in "rub[bing] off th[e] private selfishness which is the rust of society." [73] By carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval. Thus the private litigant employing peremptory challenges on the basis of race has "acted together with or obtained significant aid from state officials" [74] in a manner sufficient to meet the second part of the *Lugar* test. "A state should not be permitted to delegate the power to determine the composition of official tribunals and then disclaim responsibility for the predictably discriminatory way in which this authority is exercised." [75] On its face, it is discriminatory state action for

[71] *See Gafford v. Star Fish & Oyster Co.*, 475 F.2d 767, 767-68 (5th Cir.1973).

[72] *People v. Gary M*, 138 Misc.2d 1081, 526 N.Y.S.2d 986, 994 (1988).

[73] 1 A. Tocqueville, Democracy in America 295-96 (Vintage Books ed. 1945).

[74] *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754.

[75] Alschuler, *supra*, at 197.

the government itself to establish and maintain a system of jury selection that authorizes blatant racial discrimination by litigants using the courts set up by, paid for, and operated by the government.

III.

There are manifest differences between a criminal prosecution and a civil action and the degree of governmental involvement in each. In a criminal prosecution, the government, state or federal, initiates the proceeding against an unwilling defendant. The government prosecutes, and the full weight of the state's panoply of personnel and resources is brought to bear against the accused. In a civil matter to which the state is not a party, the plaintiff initiates the proceeding and private parties are matched against each other.

Neither the equal protection clause nor the rationale of the *Batson* case, however, is limited to the state's involvement in criminal prosecutions. The principle of equal protection applies to governmental action in civil as well as criminal matters,[76] federal as well as state.[77] While the Supreme Court in *Batson* considered only a defendant in a criminal case, its guiding precept was that a " 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.' " [78] Referring to its contemporary appraisal of the Fourteenth

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[76] *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886).

[77] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[78] *Batson*, 476 U.S. at 84, 106 S.Ct. at 1716 (quoting *Swain v. Alabama*, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-27, 13 L.Ed.2d 759 (1965)); *see also* 476 U.S. at 84 n. 3, 106 S.Ct. at 1716 n. 3 (citing cases).

Amendment in *Strauder v. West Virginia*,[79] the Court endorsed the explanation that "the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race." [80]

A.

The fundaments upon which *Batson* rests discourage any suggestion that its development is rooted solely on the criminal context. *Strauder* determined that a black defendant had been denied the equal protection of West Virginia's laws when he was criminally convicted by a jury from which members of his race had been purposefully excluded. The exclusion of blacks from the jury was not the result of circumstances peculiar to his trial, his prosecutors, or the nature of his offense, but followed from a West Virginia statute limiting eligibility for service on all grand and petit juries to white males.[81] The Court observed that the words of the Fourteenth Amendment:

> contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[82]

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[79] 100 U.S. (10 Otto) 303, 25 L.Ed. 664 (1880).

[80] 476 U.S. at 85, 106 S.Ct. at 1716; *see also Holland v. Illinois*, 108 S.Ct. 803, 810-11 ("the systematic exclusion of blacks from the jury system through peremptory challenges" is "obviously" unlawful).

[81] 100 U.S. (10 Otto) at 305.

[82] 100 U.S. (10 Otto) at 307-08.

It found the racial discrimination required by West Virginia to contradict "[t]he very idea of a jury," [83] obstructed the operation of an amendment designed "to strike down all possible legal discriminations" against blacks,[84] and held that such a law must yield to the federal statute permitting removal of civil suits and criminal prosecutions against persons denied their civil rights.[85]

The *Swain* Court surveyed the exercise of the Alabama struck-jury system in both the civil and criminal contexts, comparing it to the use of the peremptory challenge in the same aspects of other state systems.[86] After rejecting the argument that the Constitution "require[d] an examination of the prosecutor's reasons for the exercise of his challenges in any given case," [87] the Court considered Swain's broader claim that "there has never been a Negro on a petit jury in either a civil or criminal case in Talladega County" and that in criminal cases prosecutors had used their peremptory strikes to prevent blacks on the jury venire from sitting on the petit jury.[88] The Court concluded that although such a systematic practice would present a prima facie case under the Fourteenth Amendment,[89] Swain had failed to adequately allege the prosecutor's culpability in the complete absence of any blacks from the county's petit jurors, in part because he had failed to account for the participation of defense counsel in the result.[90]

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[83] 100 U.S. (10 Otto) at 308; *see also Holland v. Illinois*, 108 S.Ct. at 806-07 (citing *Strauder*); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946).

[84] 100 U.S. (10 Otto) at 310.

[85] 100 U.S. (10 Otto) at 311-12.

[86] 380 U.S. at 205-10, 217-18, 85 S.Ct. at 827-30, 834-35.

[87] 380 U.S. at 222, 86 S.Ct. at 837.

[88] 380 U.S. at 223, 85 S.Ct. at 837.

[89] 380 U.S. at 224, 85 S.Ct. at 838.

[90] 380 U.S. at 224-227, 86 S.Ct. at 838-39.

Swain's ambit was necessarily confined to the patterns and practices of prosecutors, and its standard of proof could not easily be extended to contemplate the constitutionally violative use of peremptory challenges by less frequent participants in the jury system, such as defense attorneys or counsel for civil plaintiffs. At the same time, it contemplated the inspection and discouragement of discriminatory practices in both civil and criminal employments of the jury venire.[91] *Batson*, by establishing a standard of proof that allows case-by-case inspection of the use of peremptory challenges, simultaneously commands full adoption of the promise of equal protection in every use of the venire. The universality of *Batson* was evident not only in its invocation of the equal protection clause, but also in its reliance, echoing *Swain*, on systems of proof founded primarily in the civil context.[92]

The judgment in *Batson* is but a continuation of the effort the Supreme Court began almost a century ago to eradicate the vice of racial discrimination in jury selection, extending the principles it had applied in *Strauder* and in *Swain*. As *Batson* spoke of *Strauder*, "[t]hat decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." [93] While the history of peremptory challenges may have begun before the Battle of Hastings, the federal governmental interest in eradicating racial discrimination began only after Appomatox, and the salutary effect of the equal protection clause did not end with *Batson* in 1986. As *Holland v. Illinois* [94] most recently emphasized, the Fourteenth Amendment contains

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[91] *See King v. County of Nassau*, 581 F.Supp. 493, 499-500 (E.D.N.Y.1984); *see also Clark v. City of Bridgeport*, 645 F.Supp. 890, 895 (D.Conn.1986) (citing *Swain* and *King*).

[92] *Cf. Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990).

[93] 476 U.S. at 85, 106 S.Ct. at 1716.

[94] —— U.S. ——, 110 S.Ct. 803, —— L.Ed.2d —— (1990).

an "intransigent prohibition of racial discrimination" applicable to all aspects of the jury system.[95] We must not now retreat.

B.

The only other circuits confronting the question of *Batson*'s application to civil cases have held that it applies with equal force in that context.[96] The Eleventh Circuit, in *Fludd v. Dykes*,[97] held that "the policies underlying the Supreme Court's decision in *Batson* are equally applicable in the civil context," explaining that the wrong done to an individual litigant's constitutional rights and the minimal burden imposed by *Batson* were no different in the civil setting.[98] Reaching the same result the Eighth Circuit in *Reynolds v. City of Little Rock*,[99] noted that "the Equal Protection Clause of the Fourteenth Amendment does not contain any latent distinction between criminal and civil legal process," [100] and that "[t]he more natural reading of *Batson* is that its rule of non-discrimination applies . . . without distinguishing criminal and civil legal proceedings." [101]

The concerns undergirding the *Batson* holding that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth

[95] *Ibid.*

[96] The Fourth, Sixth, and Seventh Circuits have declined to resolve the issue. *See Nowlin v. General Tel. Co. of the Southeast, S.C., Lake City Dist.*, 892 F.2d 1041 (4th Cir.1989) (unpublished opinion); *Robinson v. Quick*, 875 F.2d 867 (6th Cir.1989) (unpublished opinion); *Boykin v. Hamilton County Bd. of Educ.*, 869 F.2d 1488 (6th Cir. 1989) (unpublished opinion); *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir.1988).

[97] 863 F.2d 822 (11th Cir.1989).

[98] *Id.* at 828-29.

[99] 893 F.2d 1004.

[100] *Ibid.*

[101] *Ibid.*

Amendment was designed to cure" [102] apply to civil no less than criminal proceedings. The *Batson* opinion itself provides the explanation: "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try,"[103] and, we add, the private litigant whose dispute they are called to adjudicate, but also insults the challenged venireperson. "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply 'is unrelated to his fitness as a juror'. . . . The harm from discriminatory jury selection, indeed, extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." [104]

Peremptory challenges occupy as important a position in the trial of civil cases as they do in criminal cases, and denying the application of *Batson* in the civil setting would erect an unconstitutionally adventitious division on the operations of jury trial procedure. The same member of the community called for jury service who would enjoy protection against racial discrimination if she were assigned to a criminal venire would be subject to the exercise of a blatantly discriminatory strike if she is first asked to fulfill her duty as a civil venireperson.[105] The same Assistant United States Attorney or State District Attorney forbidden by *Batson* from infringing on the rights of a criminal defendant or a venire member called

[102] 476 U.S. at 85, 106 S.Ct. at 1716.

[103] 476 U.S. at 87, 106 S.Ct. at 1718.

[104] *Ibid.* (citations and portions of text omitted); *see also* 28 U.S.C. § 1862.

[105] *Cf.* 28 U.S.C. § 1866(c), (e), (f).

to try him would infringe on the apparently contentless rights of civil defendant and a civil venire member.[106]

Racial prejudice has no more place in the federal courtroom on the days the court is conducting a civil trial than it does on the days when the same judge, seated at the same bench, in the same courtroom, before the same American flag, is conducting a criminal trial.[107] As the Supreme Court remarked in a related context,

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race . . .[108]

For the majority, however, there remains something ineffably different about civil proceedings, a difference apparently material to the racially discriminatory exercise of peremptory strikes; "fundamentally, the entire purpose of a criminal prosecution is to enforce the purposes of the state, whereas the state has no purpose at all in civil litigation beyond preempting the use of private force to settle disputes—a purpose that is as well served, if the parties consent, by an arbitration to which the state is no party."[109] Leaving aside for the moment those civil cases to which the government is a party,[110] and differentiating the issue of state action, the majority's assess-

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[106] *See* 28 U.S.C. § 547.

[107] *See Maloney v. Washington*, 690 F.Supp. 687 (N.D.Ill.1988) (memorandum opinion), *vacated on other grounds, Maloney v. Plunkett*, 854 F.2d 152 (7th Cir.1988).

[108] *Burton v. Wilmington Parking Authority*, 365 U.S. at 724, 81 S.Ct. at 861.

[109] Majority slip opinion at 2464, at ——— - ———.

[110] *See infra* notes 118-20 and accompanying text.

ment ignores the myriad ways in which the state and society evince a genuinely *civil*, civic, and non-privatistic interest in civil litigation. The Seventh Amendment preserves the right of trial by jury in suits at common law in which the value in controversy exceeds twenty dollars, thus interposing the civil jury as an important constraint on the power of government.[111] Such civil jury cases are administered by the government and conscript citizens to serve as jurors; last year federal district courts tried more civil jury cases than criminal jury cases.[112] Nor does the nominal identification of the parties do justice to the nature of the dispute: The United States, for example, not infrequently participates in civil suits as an *amicus curiae*,[113] and private persons are authorized by Congress to act on behalf of themselves and the United States as "private attorneys general" and *qui tam* plaintiffs.[114] Congress has also authorized private claimants to seek redress for injuries otherwise compensable in common law to promote the public interests embodied in statutes such as the Clayton Antitrust Act[115] and Title VII of the Civil Rights Act of 1964.[116] In federal courts, at least, the only major category of cases in which federal governmental interest is minor is diversity, and in those the

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[111] *See* Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn.L.Rev. 639, 644, 708-10 (1973); Note, The Civil Implications of *Batson v. Kentucky* and *State v. Gilmore:* A Further Look at Limitations on the Peremptory Challenge, 40 Rutgers L.Rev. 891, 946-48 (1988).

[112] Report of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts table C7 at 225 (1988).

[113] *See, e.g.*, Sup.Ct.R. 36.

[114] *See* Caminker, The Constitutionality of *Qui Tam* Actions, 99 Yale L.J. 341, 342-44 (1989).

[115] 15 U.S.C. §§ 15, 26.

[116] 42 U.S.C. § 2000e-5. *See generally* Stewart & Sunstein, Public Programs and Private Rights, 95 Harv.L.Rev. 1195 (1982).

Constitution itself requires that the federal judiciary provide a forum that is not only neutral but equally protective of individual rights.[117]

C.

Although the majority finds "no occasion to consider the situation presented where the state appears as a civil litigant," [118] such an occasion will necessarily disturb its intended limitation of *Batson* to the criminal context. When government is a litigant, it becomes clear that "[t]he distinction that is crucial for application of equal-protection principles is that between governmental actors and private actors." [119] Pursuing the criminal-civil distinction under such circumstances would seemingly license the state's discriminatory exercise of peremptory challenges in a manner "[]related to the outcome of the particular [civil] case on trial" [120] if it chose to seek civil sanctions rather than criminal against a particular defendant. The Fourteenth Amendment (and, for that matter, the Eighth) does not admit of such a subtle understanding of civil rights. Once such a case is considered, the criminal-civil distinction collapses, leaving only the examination of state involvement in those cases to which the government is not a party, such as the present one. The "slippery slope" that concerns the majority,[121] whether the product of *Batson*'s extension to other protected groups or its extension to civil jury trials, must simply be considered a necessary product of the scope of the equal protection clause, and cannot be used to suggest a limit to its dictates or a retreat from the logic of *Batson*.

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[117] U.S. Const. art. III, § 2, cl. 1.

[118] Majority slip opinion at 2463 n. 10, at —— n. 10.

[119] *Reynolds v. City of Little Rock; see also Fludd*, 863 F.2d at 828-29; *Clark*, 645 F.Supp. at 894-96.

[120] *Swain*, 380 U.S. at 224, 85 S.Ct. at 838.

[121] Majority slip opinion at 2461-2462, at ——-—— n. 6.

IV.

The use of peremptory challenges solely on the basis of racial animus, that is, as a device to bar a citizen from trial by a jury of all of his peers, save those of a certain race, cannot be justified by its history, ancient or modern, or by its utility to lawyers in attempting to win lawsuits. Racial prejudice was sanctioned by both the original Constitution and the Bill of Rights. The enactment of the equal protection clause marked the beginning of a new era, an era in which it was to be hoped that the color of a person's skin would not affect his legal rights.

The requirement of state action is in large part intended to "require the courts to respect the limits of their own power as directed against state governments and private interests." [122] "The petit jury," in turn, "has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." [123] Edmondson's invocation of his constitutional rights compels us to acknowledge the scope of judicial culpability in administering the racially discriminatory exercise of peremptory strikes against what remains, at least if unblemished, a cherished bulwark against every misuse of authority. We must take another step toward the goal of eradicating racial prejudice by eliminating the shameful practice of permitting a federal statute to be employed in a trial in a federal courtroom as a weapon of discrimination. I regret that the majority cannot yet see that to permit a person to be rejected from a jury solely because of the color of his skin rejects the promise upon which this nation's independence was based and the guarantee that the Fourteenth Amendment provides: that all persons are created equal. In God's sight. In human right. And in regard to service on a federal jury.

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[122] *Lugar*, 457 U.S. at 936-37, 102 S.Ct. at 2753.

[123] *Batson*, 476 U.S. at 86, 106 S.Ct. at 1717 (citations omitted).

SUPREME COURT OF THE UNITED STATES

No. 89-7743

THADDEUS DONALD EDMONSON,
Petitioner

v.

LEESVILLE CONCRETE COMPANY, INC.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 1, 1990

No. 89-7743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THADDEUS DONALD EDMONSON,
Petitioner,

v.

LEESVILLE CONCRETE COMPANY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I.

Should the rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), be adopted in Civil Cases in the U.S. District Courts to prohibit a party from exclusion from the jury venire by means of peremptory challenge, a member of the same minority race as his opposite litigant, when a *prima facie* showing pursuant to the *Batson* burdens of proof have been made?

II.

Is a U.S. District Judge empowered to supervise the exercise of Peremptory Challenges by a Party pursuant to 28 U.S.C. 1870, if it be shown by *prima facie* proof that such exercise is taking place in a constitutionally impermissible matter?

III.

When a private lawyer appearing in the course of litigation on behalf of a private party against a member of a minority discriminatorily utilizes a power granted to him by the sovereign, does that private counsel engage in "State Action" sufficient to bring him within the constitutional limitations imposed by the Equal Protection Clause of the Fourteenth Amendment?

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BRIEF FOR PETITIONER

DECISIONS BELOW

The opinion of the U.S. Circuit Court for the Fifth Circuit, is reported at 890 F.2d 308 (5th Cir. 1988). The decision of the U.S. Court of Appeals, Fifth Circuit, sitting *en banc*, is reported at 895 F.2d 218 (5th Cir. 1990).

STATEMENT OF JURISDICTION

The Petition of Thaddeus Donald Edmonson seeks review of the judgment of the U.S. Court of Appeals, Fifth Circuit, entered on the first day of March, 1990, pursuant to an *en banc* rehearing. The original panel

opinion was entered on the fifth day of December, 1988. On the 23rd day of March, 1990, the Court of Appeals for the Fifth Circuit issued its mandate.

This Petition is filed timely pursuant to 28 U.S.C. 2101 (C). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTES PRESENTED FOR REVIEW

I.

United States Constitution, Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II.

United States Constitution, Amendment 7

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

III.

United States Constitution, Amendment 14

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV.

28 U.S.C. 1861. Declaration of Policy

> It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the Court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

V.

28 U.S.C. 1862. Discrimination Prohibited

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States and the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

VI.

28 U.S.C. 1870. Challeges

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

VII.

42 U.S.C. 1981. Equal rights under the law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Thaddeus Donald Edmonson, a black male, instituted suit against Leesville Concrete Company in the United States District Court for the Western District of Louisiana, Lake Charles Division, alleging injuries resulting from negligence which Edmonson claimed occurred on a Federal enclave. The case was tried to a Jury composed of twelve persons.

Edmonson exercised his peremptory challenges pursuant to 28 U.S.C. 1870 when invited to do so by the Court, and excluded three white venire persons. Of the originally impaneled venire, three were members of the black race. The defendant used two of his three peremptory challenges to exclude black jurors.

Both Edmonson and Leesville were represented at Trial by privately-retained counsel. The exercise of the peremptory challenges was made in each instance after the Court had conducted *voir dire* examination of the jury panel (reproduced in the join appendix in its entirety).

Included within the same panel facing counsel at the time were four persons who acknowledged a personal relationship with Edmonson's counsel, or one of his law partners. Additionally, prior to tendering the panel for peremptory challenge, the Court excluded, for cause, a

juror who voiced on *voir dire* a racial animus toward members of the Plaintiff's race (J.A., at pp. 31-32).

The challenges were made in writing by the two counsel. Specific jurors were challenged by name on a form presented for that purpose to counsel by the Court (J.A., at p. 46).

When the Defendant used his peremptory challenges to strike members of the same race as Plaintiff, objection was made, citing *Batson v. Kentucky*, 106 S.C. 1712, 90 L.Ed.2d 69 (1986) (J.A., at p. 47). In connection with his objection, counsel suggested that Edmonson had presented *prima facie* proof which would key the provisions of *Batson*, namely: (1) that Edmonson was a member of a cognizable racial group; (2) that the opposition had exercised peremptory challenges to remove from the *venire* members of Edmonson's race; and, (3) that those facts, together with other relevant circumstances—including the cursory *voir dire* performed by the Court, which failed to reveal the age of two of the excluded jurors; the lack of questions asked by counsel for Leesville; and the challenging of black jurors over others whose connection with Edmonson's counsel would seem to make them less desirable—required the Court to make further inquiry to confirm Leesville had racially-neutral reasons for striking the two members of Plaintiff's race. *Batson*, 106 S.Ct. at p. 1723.

After some considerable discussion, the Court disallowed Edmonson's Constitutional claim (J.A., at pp. 47-49, 50-53), refused to require Leesville's counsel to state a racially-neutral basis for excluding the challenged black jurors, and empaneled the jury without the challenged black jurors over Edmonson's continuing objection.

The case then proceeded to trial. The selection procedures employed by Leesville were obviously intended to impact on Edmonson, particularly considering the nature of the case. Edmonson was injured when struck by a

piece of equipment on the work place. He claimed a variety of injuries resulting from that accident, culminating in a surgical procedure which was employed on his neck. The attacks made on Edmonson by Leesville primarily concerned themselves with his credibility. The credibility of the plaintiff was most at issue in the relationship between the accident and the later neck surgery which was performed. In large part, whether the jury connected the event with the surgery had to do with whether they believed Edmonson's testimony.

Leesville, in making this case, sought the services of Dr. Paul P. Ware, a licensed psychiatrist in Shreveport, Louisiana, which is a five-hour drive from the site of the trial. Edmonson attended two examinations conducted by Dr. Ware voluntarily after Leesville sought them. Dr. Ware is white.

His testimony consisted of the results found by him on his examination and other testimony, including his surreptitious observations of Edmonson conducted through his office window while Edmonson was in the parking lot of Ware's office. From these observations, the testing that he did, and the examination he conducted, Dr. Ware, who testified live at the trial as an expert witness, concluded Edmonson was lying and malingering. Because of the disparity between Edmonson's demands and the ultimate result, it is clear the jury believed the testimony of Dr. Ware, and, from that conclusion, believed Edmonson was lying. The ultimate credibility determination made in the case, then, was made by a jury which had been handpicked by Leesville to exclude members of Edmonson's race, who may have otherwise been anticipated to be predisposed towards Edmonson's position.

Edmonson was awarded $90,000 by the jury, an amount which did not far outstrip his medical expenses, but had this award reduced 80% for his alleged contributory negligence. On appeal, the Fifth Circuit panel reversed, applied *Batson* to the Constitutional challenge

made by Edmonson, and remanded to the Trial Court for further consideration of Edmonson's constitutional claim. On rehearing *en banc*, the Circuit Court reversed the panel, finding Edmonson's claims lacked Constitutional merit because no state action could be found.

It is from that decision this Petition proceeds.

SUMMARY OF ARGUMENT

I.

The unfettered use of peremptory challenges, even in cases where it is clearly based upon group bias, deprives a litigant of his "fair possibility for obtaining a representative cross-section of the community" on his jury, deprives a minority juror of his liberty interest in serving on a jury, and casts into doubt the fairness of the jury system.

II.

This Court's consistent interpretation of the Civil Rights Act of 1866, together with the post-Civil War amendments, provides an ample basis for an examination of the motives of counsel exercising peremptory challenges in a jury trial in the United States District Courts. An examination of the motive behind those challenges requires not only that the judge exercise his option to intervene when racial motivations are shown by inference, but obliges him to do so.

III.

The actions of a private lawyer in utilizing a peremptory challenge statute to exclude members from the jury venire based on their race constitutes state action, since his effort in this regard is assisted by the sovereign, and thus, necessarily manipulates government action to a sufficient degree that his actions may be fairly attributed to the Government.

IV.

This Court has the supervisory authority to correct errors in the United States District Courts concerning the exercise of peremptory challenges based upon race, and the exercise of that supervisory authority is appropriate in this case.

ARGUMENT

Thaddeus Edmonson's Constitutional claim arose when he lost his "fair possibility for obtaining a representative cross-section of the community" [1] on this jury by virtue of Leesville Concrete Company's exercise of peremptory challenges to strike African-Americans.

Edmonson's invocation of his rights is based on this Court's decision in *Batson v. Kentucky* [2] as well as its consistent recognition of the Constitutional requirement of fair play, particularly when the issue turns upon a challenged jury selection process based upon invidious racial or, in some cases, economic [3] group bias.

Opposed to this proposition, Respondent first argues for a narrow interpretation of the state action requirement espoused by the Fifth Circuit's *en banc* majority. Respondent also makes little effort to disguise the central theme of its argument: that, if discrimination exists in jury selection in a civil case, insofar as that discrimination is activated by a litigant's statutorily-granted exercise of peremptory challenges [4], it is no business of the Court.

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[1] *Williams v. Florida*, 399 U.S. 78, at p. 100; 90 S.Ct. 1893, at p. 1906; 26 L.Ed. 446 (1970); *Harlan v. Illinois*, —— U.S. ——, 110 S.Ct. 803 (1990), at p. 825, dissent of Justice Stevens.

[2] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[3] *Thiel v. Southern Pacific Company*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946).

[4] 28 U.S.C. 1870.

At the outset, it must be said that such a proposition is "at war with our basic concepts of a democratic society and a representative government" [5] and in direct conflict with the policies enunciated by this Court since the War Between the States.

The aberrant position of Respondent, and of the Fifth Circuit, 895 F.2d 218 (5th Cir. *en banc* 1990), is easily demonstrated by review of the enunciated policies of this Court with respect to jury selection and the use of peremptory challenges, and the exercise of the Court's power to recognize and correct judicial error committed contrary to our fundamental democratic institutions.

I. REVIEW OF STATUTORY PROVISIONS RELATING TO JUROR QUALIFICATIONS AND PEREMPTORY CHALLENGES: LEGISLATIVE HISTORY OF THE 1866 CIVIL RIGHTS ACT AND THE POST-CIVIL WAR AMENDMENTS

Although the Civil War and the Thirteenth Amendment abolished the slavery of the black race, its effects continue to be pervasive. As the first Court concerning itself with the post-Civil War amendments noted:

> . . . [N]otwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal Government, be almost as bad as before. Among the first acts of legislation adopted by several of the States . . . , were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in their pursuit of life, liberty, and property to such an extent that their freedom was of little value . . .
>
> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it.

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[5] *Smith v. Texas*, 311 U.S. 128 at p. 130, 61 S.Ct. 164 at p. 165, 85 L.Ed. 84 (1940).

> They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.[6]

A series of statutes was passed to rectify this previous condition of servitude, most notably the Civil Rights Act of 1866.[7] That Act, with its mandate that all persons have equal enumerated rights to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . ." precisely focused upon those identified evils. Its legislative history, recently examined in extensive detail by this Court,[8] established the intent of Congress:

> If any person, "under color of any law," shall subject another to the deprivation of a right to which he is entitled, he is to be punished . . . . In some communities in the South, a custom prevails by which different punishment is inflicted upon blacks from that meted out to whites for the same offense. Does this section [Section 2] propose to punish the community where the custom prevails? Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else.[9]

The Act, then, "constituted an initial blueprint of the Fourteenth Amendment." [10] Two months later, Congress

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[6] *The Slaughter House Cases*, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1872).

[7] 42 U.S.C. 1981.

[8] *Jett v. Dallas Independent School District*, 109 S.Ct. 2702, —— U.S. ——, 105 L.Ed.2d 598 (1989).

[9] *Id.* at p. 2714, Speech of Senator Trumbull.

[10] *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 at p. 389; 102 S.Ct. 3141 at p. 3149; 73 L.Ed.2d 835 (1982).

passed a joint resolution sending that amendment to the States for ratification.

Its "majestic generalities," [11] and its explicit guarantee to all parties of the "equal protection of the law," provides the basis for many arguments advanced against the deprivation of the rights of black citizens. But its phraseology is not limited to those actions which are engaged in by a state, particularly when the issue being examined concerns racial discrimination.[12] As this Court said in 1880:

> The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealously and a positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discrimination against them had been habitual . . . The colored race, as a race, was abject and ignorant, and in that condition was unfit to command the respect of those who had superior intelligence . . . They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the pro-

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[11] *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947).

[12] Cf. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

> tection of the general government, in that enjoyment, whenever it should be denied . . .[13]

Strauder specifically concerend itself with the issue before the Court today—the exclusion of black citizens from a jury. The ultimate result was to find this practice constitutionally repugnant, and violative of the spirit and intent of both the Fourteenth Amendment and Section 3 of the 1866 Act.

There is no doubt Congress specifically had in mind the ability of black citizens to obtain justice in the courts when it enacted these laws, and the post-Civil War amendments. It codified these principles in 1875 by enacting a statue providing:

> . . . [N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude . . .[14]

The original statute, making no distinction between civil or criminal litigation, contained an unambiguous clarity of motivation soon recognized by this Court:

> For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination . . . A Negro who confronts a jury on which no Negro is allowed to sit . . . might very well say that a community which purposely discriminates against all Negroes discriminates against him.[15]

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[13] *Strauder v. West Virginia*, 100 U.S. 303 at p. 305; 10 Otto 303 at p. 305; 25 L.Ed. 664 (1880).

[14] 18 Stat. 336-37, former 8 U.S.C. § 44; *see also* 28 U.S.C. 1862 (1968).

[15] *Fay v. New York*, 332 U.S. 261, at p. 282-3; 67 S.Ct. 1613, at p. 1625; 91 L.Ed. 2043 (1947).

Currently, the right by which civil litigators exercise peremptory challenges is found in 28 U.S.C 1870, which provides, "in civil cases, each party shall be entitled to three premptory challenges." But, read together with the consistent statutory scheme of the Congress and the proscriptions placed upon its use by this Court and the Fourteenth Amendment, it is clear the current statute may only be constitutionally enforced in the absence of racially-discriminatory selection procedures:

> If the Congress had the poor judgment to enact a statute declaring, "peremptory challenges may be used to excuse jurors on the basis of their race," there would be little doubt that the statute would be unconstitutional. This conclusion ineluctably follows from the decision in *Reitman v. Mulkey*, [387 U.S. at p. 371, 87 S.Ct. at p. 1629] in which the Supreme Court held unconstitutional California Proposition 14, an amendment to the State Constitution permitting any person to decline to sell or lease property to another person "as he, in his absolute discretion chooses." By adopting this amendment, the Supreme Court held, the state affirmatively sanctioned private discrimination as one of its basic policies. Interpreting 28 U.S.C. 1870 to allow the exclusion of jurors because of their race would condone conduct that could not be explicitly allowed.[16]

Any opposite conclusion leads to an absurd result. If Leesville's counsel had the ability of renting space in the same Federal courthouse where the jury was empaneled for the purpose of feeding his witnesses in a federally-owned cafeteria, he could not, consistent with the law, exclude members of the black race from his party.[17] The Government which so profoundly concedes

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[16] *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir. 1988) at p. 1312, Panel Opinion of Judge Rubin.

[17] *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

itself with such an event cannot, within the same constitutional scheme, apply a lesser degree of protection to those who would sit in the jury box to hear the case.[18]

II. EXCLUSIONARY JURY PROCEDURES USING GROUP BIAS AS THE DETERMINATIVE FACTOR HAVE CONSISTENTLY BEEN CRITICIZED BY THIS COURT

Although many early cases addressing the issue of jury selection focused on the "fair possibility" of obtaining an impartial jury at the pool stage,[19] this Court's modern view establishes that *any* procedure whick operates to "stack the deck" in favor of one race or class over another is impermissible.

While *Batson* primarily addressed the issue of a criminal litigant's life or liberty interest in obtaining the "fair possibility" of an impartial jury, it also recognized other injured parties, including the excluded juror. By now, at least the latter principle is "the established rule . . ." [20]

Any process legalizing the exclusion of jurors based on group bias is so contrary to our fundamental ideals of fairness that this Court has extended its standing requirement first voiced in *Batson* to include any litigant, even one not a member of the excluded class.[21] The target of this effort, then, is not only the enforcement of the rights of a minority litigant, but the protection of the jury system:

> To bar the claim whenever the defendant's race is not the same as the juror's would be to concede that

[18] *See also, Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978).

[19] *Cf. Thiel v. Southern Pacific Company, supra.*

[20] *Holland v. Illinois*, 110 S.Ct. 803, —— U.S. ——, 107 L.Ed.2d 905 (1990), concurrence of Justice Kennedy.

[21] *Ibid.*

> racial exclusion of citizens from the duty, and honor, of jury service will be tolerated, or even condoned. We cannot permit even the inference that this principle will be accepted, for it is inconsistent with the equal participation in civic life that the Fourteenth Amendment guarantees.[22]

Thus, *Batson's* original requirement that a litigant only achieves standing to complain of the juror's exclusion when he is a member of a "cognizable racial group" has been loosened. Since it has, the focus is no longer on the life or liberty interest of the person challenging the act, but on the harm to the system.

A juror excluded by peremptory challenge from either a civil or criminal case would have the same legal right to bring suit complaining of the action.[23] This seems to be true whether an equal protection analysis is used, or by invoking the inherent supervisory power of the Federal courts:

> On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class . . . It is likewise immaterial that the jury which actually decided the factual issues in the case was found to contain at least five members of the [excluded] class. The evil lies in the admitted wholesale exclusion of [the class] in disregard of the high standards of jury selection. To reassert these standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.[24]

Whether the machinery of discrimination involves differentiation of groups based on a color-coding system in

[22] *Ibid.*

[23] *Carter v. Jury Commission of Greene County*, 396 U.S. 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed. 549 (1970).

[24] *Thiel, supra* at p. 988.

the jury tickets,[25] or by peremptory challenge,[26] the same result is reached: It allows "those to discriminate who are of a mind to discriminate." [27] Thus, while the initial focus of this Court's attention was on the fair cross-ssection requirement as concerns the makeup of jury venires, it has unquestionably been extended, at least in cases of racial group bias, to peremptory strikes which achieve the same result.

When racial discrimination is the undoubted object of the questioned action, this Court has always applied closer scrutiny:

> . . . [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.[28]

The same high standard applies to private conduct, overriding the interests of parents in their decision regaring where, and by whom, their child is raised:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial

[25] *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891 (1953), 91 L.Ed. 1244.

[26] *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824 (1965).

[27] *Avery, supra*, at p. 562 (892 S.Ct.).

[28] *Bolling v. Sharpe*. See Footnote 11, *supra*.

> prejudice that they assume to be both widely and deeply held." (citations omitted)[29]

Governmental oversight as an equal protection concept also extends to the private conduct of parents whose educational plan for their children places them in a school which discriminates in its admissions policy based on the race of prospective students,[30] and to private hiring decisions made by employers.[31] Even the sovereign's interest in fighting the war on drugs is subject to examination when it appears a drug courier profile contains a racial component.[32]

With such a strong policy statement in place for so many years, it is not surprising the actions of lawyers in selecting juries through the devices made available to them by the sovereign are also subject to scrutiny. Even without the aggravating presence of state action (See § 3, *infra*), such conduct is subject to judicial examination. It cannot logically be said that, if a parent's interest in where and with whom his children will live; where they will attend school; or an employer's interest in the makeup of his work force is reviewable by the courts on grounds of racial bias, that the actions of counsel, performing on a stage provided by the sovereign, guided by the laws and customs established by the sovereign, are not.

Just as the sovereign has an interest in levelling the playing field for schoolchildren and employees, prospec-

[29] *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).

[30] *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).

[31] *Patterson v. McLean Credit Union*, —— U.S. ——, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

[32] *U.S. v. Taylor*, No. 89-6396 (6th Cir., October 25, 1990).

tive property owners,[33] group access to governmental facilities,[34] and bar admissions [35] by removing the bumps of group bias, it has an interest in preserving the operation of its courts. Indeed, these concerns were primary in *Batson*:

> Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. . . . A person's race simply "is unrelated to his fitness as a juror." . . . As long ago as *Strauder*, therefore, the Court recognized that in denying a person participation in jury service on account of his race, the excluded juror . . .
>
> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice . . . Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." [36]

One district court considering the same issue has specifically recognized the practical application of this expressed ideal of fairness in a Seventh Amendment case:

> Although the Seventh Amendment preserves "the right of trial by jury" in civil cases, it does not expressly provide for the jury's impartiality. Yet the impartiality of the jury "is inherent in the right of trial by jury and is implicit in the requirement of the Fifth Amendment . . ." It is the role of a

[33] *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

[34] *Burton*, see Footnote 17, *supra*.

[35] *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985).

[36] *Batson*, at p. 1717-18 (bracketed material supplied).

> district court to safeguard a litigant's constitutional right to an impartial jury during all stages of trial, commencing with jury selection and ending when the jury returns its verdict.[37]

In the Howard Beach case,[38] tried in a state whose constitutional provision was "synonymous with the Fourteenth Amendment," the court, using the same considerations, and citing the Fifth Circuit's original panel opinion in *Edmonson*, extended the ban on racially-motivated peremptories to the defense attorney, using the same policy arguments. As Judge Rubin said for the original majority:

> Justice would indeed be blind if it failed to recognize that the federal court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race. The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, "Mrs. X, you are excused." [39]

Even the dissenting panel member, who ultimately wrote the *en banc* majority opinion, recognized the logical end of petitioner's argument:

> The sweeping result in today's case seems to me so unfortunate that I cannot join in it, even though the most dubious features of the majority opinion derive, not from the reasoning of my brethern, but from earlier decisions of the Supreme Court. Indeed, it may be arguable that—given those decisions—this result is unavoidable.[40]

[37] *Olsen v. Bradrick*, 645 F. Supp. 645 (D. Conn., 1986), at p. 653.

[38] *People v. Kern*, 547 N.Y.S.2d 4, 149 A.D.2d 187, 58 U.S.L.W. 2145 (N.Y.S.Ct., 1989)

[39] *Edmonson, supra*, at p 1313.

[40] *Ibid*, at p. 1315.

Reviewing *Shelley* and *Burton* together with two cases dealing specifically with alleged due process violations conducted by means of the judicial process,[41] which share the common limitation on the reach of governmental power into private action, Judge Rubin concluded:

> The Constitution that forbids judicial enforcement of covenants based on race equally prohibits judicial enforcement of peremptory challenges so motivated. The Constitution that forbids private parties to discriminate based on race through the use of a state non-claim statute equally prohibits private parties from so discriminating through the use of a federal peremptory challenge statute. The Constitution that forbids a private restaurant on state-owned property to discriminate based on race equally prohibits a private party in a federal courtroom from so discriminating.[42]

His eloquent and impassioned dissent to the *en banc* ruling, joined by three others, is in the same vein:

> Racial prejudice was sanctioned by both the original Constitution and the Bill of Rights. The enactment of the equal protection clause marked the beginning of a new era, an era in which it was to be hoped that the color of a person's skin would not affect his legal rights. . . .
>
> Edmonson's invocation of his Constitutional rights compels us to acknowledge the scope of judicial culpability in administering the racially discriminatory exercise of peremptory strikes against what remains, at least if unblemished, a cherished bulwark against every misuse of authority. . . . I regret that the majority cannot yet see that to permit a person to be rejected from a jury solely because of the color of his skin rejects the promise upon which this nation's independence was based and the guarantee that the Fourteenth Amendment provides: that all persons are created equal. In God's sight. In human right. And in regard to service on a federal jury.[43]

[41] *Lugar v. Edmonson Oil Company*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed. 482 (1982); *Tulsa Professional Collection Service v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

[42] *Edmonson, supra*, at p. 1312 (panel opinion).

III. THIS COURT'S AUTHORITY TO INTERVENE: 42 U.S.C. 1981, SUPERVISORY POWER, AND STATE ACTION

The opinion of this Court will not be written on a blank slate. The *Batson* requirement facing Edmonson at the time of the opposition's exercise of challenges was met, but one additional factor shows the end result which will inevitably be reached based on an unfettered exercise of peremptories.

The Lake Charles Division of the United States District Court for the Western District of Louisiana is composed of the Parishes of Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis, and Vernon. According to the 1980 census, the racial makeup of those parishes is 19.7% black, 78.9% white.

The jury selection process used by the District Judge required him to ultimately empanel twelve jurors.[44] To reach that number, eighteen names were drawn at random and seated in the order they were called in the jury box. Since each side had the ability to exercise three peremptories, the first twelve jurors not stricken made up the panel.

Three black jurors were among those selected for the venire. At that level, they constituted 16.7% of the jurors facing counsel, a number not statistically different from the percentage of blacks in the population from which the jury was drawn. Thus, by the unfettered exer-

[43] *Edmonson, en banc* panel opinion, at p. 240.

[44] J.A. at p. 14.

cise of three peremptory challenges, counsel for respondent had the opportunity to deprive Edmonson of any "fair possibility" of obtaining a representative jury, i.e., one on which blacks were represented.

A. The Option of the District Judge

Petitioner's position has always been that he established a prima facie case at the trial level without any specific racial animus being expressly voiced to the court by respondent. But *query*: What if, instead of relying on the voir dire as is, counsel for respondent stood up when the three black members were empaneled, announced to the court that, solely on the basis of their race, he was going to strike them peremptorily from the jury, and there was no need for voir dire. Would the trial judge then have been obligated to honor his request under 28 U.S.C. 1870?

If so, the judge would be an actor in a process of discrimination. If it is a given that a juror so excluded obtains a right of action under the 1866 Act,[45] by what rational basis would the judge be excluded as a defendant if his actions gave effect to the bias so clearly displayed?

If there comes a point when the trial judge has the *option* of refusing to give effect to peremptory challenges, an *obligation* arises when the same facts are presented, either by inference or by explicit statement.

Such activity taking place in a federal courtroom is far from private. But even if it is, per *Runyon*, *Shelley*, *Patterson*, and *Burton*, it cannot be outside the statutory scheme of the 1866 Act, or the Fourteenth Amendment.

Thus, the second question presented for review by Edmonson must be answered in the affirmative: A trial judge *is* empowered to supervise the exercise of peremp-

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[45] *Carter, supra* at Footnote 23; *Holland v. Illinois, supra* at Footnote 20, concurrence of Justice Kennedy.

tory challenges pursuant to 28 U.S.C. 1870. If he is, the shibboleth that he cannot, raised by respondent, evaporates.

B. Supervisory Power

Independent of any other basis upon which this Court could act, it has supervisory authority to correct errors by lower courts.

The trial judge in this case clearly believed he was without authority to command respondent to voice a racially-neutral reason for the exercise of his peremptory challenges [46] or to otherwise intervene in the process. This perception is wrong. If so, this Court best performs its judicial function by correcting the misperception.

A similar situation was encountered by this Court in *Thiel*, which recognized the inequity of result which occurred, but did not, within the body of the decision, seek to identify any particular actor in the process as the culprit, and did not resort to any analysis of due process, Fourteenth Amendment versus Fifth Amendment rights, or any requirement of "state action" in the procedure employed. Rather, recognizing both the inequity which existed as to the specific litigant and the damage which would be wrought on the jury system were it allowed to stand, the Court invoked its supervisory authority, identified the evil, and corrected it by reversing the judgment.[47]

This issue was squarely addressed by the Fifth Circuit in an *en banc* case decided while *Batson* was under consideration by this Court, and later vacated.[48] In dissent, Judge Williams, after posing a hypothetical identical to that posed by Petitioner above, said:

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[46] J.A., at p. 51.

[47] *Thiel*, at p. 988, citing *McNabb v. U.S.*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 879 (1943).

[48] *United States v. Leslie*, 783 F.2d 541 (5th Cir. *en banc* 1986); vacated 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed. 128 (1987).

> The role and the scope of the supervisory power are delineated by establishing four basic propositions. . . . First, this Court possesses broad supervisory powers over lower courts. Second, there is no doubt that the supervisory powers of federal courts may be used to correct injustices which do not amount to constitutional or statutory violations. Third, the supervisory power—encompassing broadly several forms of deterrents of prosecutorial misconduct—is appropriate on the facts of the present case. Fourth, although Congress undoubtedly has the right to override supervisory power rulings through legislation, Congress has not spoken with respect to the narrow holding of the panel [which reversed the conviction based on the racially-motivated strikes].[49]

Judge Williams' dissent also points out the variety of instances where judicial rule-making has occurred, including new jury selection standards for civil actions; establishing standards for administrative hearings;[50] to reverse convictions supported by false evidence; to curtail improper practices by federal attorneys; to suppress evidence gained by misconduct; and to protect a defendant from an overzealous district court judge.

This Court has exercised its supervisory power in exactly the fashion sought by Petitioner. When women were excluded from jury service, and were determined to be a member of a "distinctive group," the Court's supervisory power was invoked as the *only* basis for changing the rule of the case.[51] The Court's supervisory power has

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[49] *Ibid.* at 568, citing also *McNabb, supra*; *U.S. v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), for the proposition that "The supervisory power allows courts to 'preserve judicial integrity by insuring that a conviction rests upon appropriate considerations validly before the jury.'"

[50] Citing *Woodby v. I.N.S.*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966).

[51] *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946).

been characterized as subject to no substantial limitations, save those conferred on it by legislative action,[52] and is exercised primarily on grounds of overriding judicial policy:

> The variety of situations in which it has been invoked defies any attempt to construct a definition of supervisory power which is at once comprehensive and accurate . . . The sole common denominator of its usage is a desire to maintain and develop standards of fair play in the federal courts more exacting than the minimum constitutional requirements of due process.[53]

C. State Action

Respondent, in his opposition to the petition, suggests this case is distinguishable from others in which Circuit Courts[54] reach the contrary conclusion because the litigants here are private, as opposed to governmental. His argument in this regard is misplaced and overly technical. It is respectfully submitted that the Fifth Circuit's *en banc* panel, while it correctly identified the issues to be decided, did not resolve them correctly.

At the outset, it should be obvious petitioner does not concede state action is required in any classic sense for his position to prevail. If it is, though, the governmental nature of the transaction is apparent.

First of all, this Court has recognized in two opinions, *Lugar*[55] and *Pope*,[56] that private litigants can violate "due process" of others when they engage the system as

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[52] Note, *The Supervisory Power of the Federal Courts*, Harv.L. Rev. 1656 (1963).

[53] Note, 53 Geo.L.J. at p. 1050, as cited in *Leslie, supra*.

[54] *Fludd v. Dykes*; 863 F.2d 822 (11th Cir., 1989); *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir., 1990).

[55] Cited at Footnote 41, *supra*.

[56] Cited at Footnote 41, *supra*.

a co-actor. When this occurs, such counsel acts with the "significant assistance of the sovereign." In *Lugar*, the plaintiff sought damages, by means of an action under 42 U.S.C. 1983, resulting from an alleged wrongful seizure of property. Deciding what circumstances would result in a "fair attribution" of the actions of the parties to the state, the Court devised a two-part approach:

> First, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.[57]

Judge Gee, writing for the *en banc* majority [58] and in dissent to the panel opinion,[59] concedes the first prong of *Lugar* is satisfied. In addressing the second point, Judge Gee, as does respondent, relies on this Court's decision in *Polk County v. Dodson*.[60] *Dodson* is a poor analogy to the present situation, primarily because the finding that the public defender had acted "under color of state law" was jurisdictional in view of the nature of the action (42 U.S.C. 1983). Second, the underlying lawsuit had little to do with the public defender's employment relationship with the state, and everything to do with the quality of the representation she provided. Dodson's complaint was personal against his attorney, not against the institution which employed her.

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[57] *Lugar, supra*, at p. 2753-4.

[58] At p. 221.

[59] At p. 1315.

[60] 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

In the present context, although this Court has never so held and need not do so as part of its decision, the more modern rule seems to be that a defense lawyer in a criminal case engages in state action, at least when exercising peremptory challenges based on group bias.[61] In *Fludd*, although one of the parties was a governmental official, *Batson* was extended without resort to this fact.[62]

Thus, the lawyer, acting with the significant assistance of the sovereign, supplies the requisite state action needed to transform his exercise of peremptory challenges from private action to state action, reachable without further qualification by the dictates of the Fourteenth Amendment.

The *en banc* majority gives short shrift to the proposition that the Court's allowance of the peremptory challenge, in and of itself, constitutes state action. It quotes *Swain* in stating that the peremptory challenge "is one exercised . . . without being subject to the Court's control . . ." [63] It characterizes the judge's actions as "merely ministerial" and a "mere standing aside . . ."

This minimalist view of the trial judge is not supported by trial practice, or by other elements of the statutory scheme which allow the judge to intervene in decisions which are no different in character than a decision whether or not to allow a peremptory challenge. As Judge Rubin pointed out in his dissent:

> . . . [T]he trial judge may affect every aspect of the exercise of peremptory challenges. Most plainly, the judge has broad discretion in determining the

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[61] *People v. Kern, supra*, at Footnote 38; *People v. Gary M*, 138 Misc.2d 1081, 526 N.Y.S.2d 986 (1988); *People v. Wheeler*, 22 Cal.3rd 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978); Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 Tex.Tech.L.Rev. 921 (1988).

[62] *Fludd, supra*, at p. 823.

[63] 865 F.2d at p. 221.

appropriate number and allocation of peremptory challenges in all multi-party cases, and may even limit ten criminal co-defendants to a total of ten peremptory challenges.

Less directly, courts determine the impact of any given number of peremptory strikes. Local court rules control the number of jurors that are eventually impaneled in civil cases, thereby governing the relative effectiveness of peremptory challenges in determining the composition of the jury. Individual judges control the conduct of *voir dire* and the information that may be discovered about the venire, thus affecting the exercise of both peremptory challenges and challenges for cause. Of course, by virtue of the trial judge's broad discretion over the exercise of challenges for cause, he may determine the number of jurors who remain eligible for the exercise of peremptory strikes, or the court's own strikes, for eventual impaneling . . .

> The majority's view of the court's "purely ministerial role" in supervising peremptory challenges is perhaps most strikingly belied in the trial judge's broad discretion to determine the manner in which peremptory challenges are exercised: he may decide which side exercises the last challenge, may require simultaneous exercise of challenges by prosecution and defense, and may even require that one party exercise her challenges first, thereby allowing the other party to then act with full knowledge of her opponents choices. [Footnotes Omitted] [64]

The true role of the judge is best described in *People v. Gary M* [65]:

> . . . [T]he State is not merely an observer of the discrimination, but a significant participant . . . . The only thing the State does not do is make the

[64] 865 F.2d, at pp. 233-4.

[65] Cited at Footnote 61, *supra*.

> decision to discriminate. Everything else is done or supplied by the State.[66]

The "action" taken by the trial judge is no different when he "stands aside" in the face of a blatant exercise of racial discrimination in the selection process, than when such an exercise is proved by inference in accordance with *Batson*'s terms. Had Judge Veron, in compliance with the undisputed policy of this Court, recognized even the mere possibility that the opposition was engaging in discriminatory use of peremptory strikes, the situation now before the Court could have been avoided.

The judge's conscious decision to stand aside was apparently based on a misconception and a misapplication of the law. He clearly believed the only relevant discrimination which could take place was that occasioned by the original empaneling of the venire [67] rather than the action of Leesville's counsel in striking two of the three black persons from the jury. This focus on the procedure employed was misplaced. If the *Batson* inferences were met by Edmonson, the court was compelled, not to stand aside, but to engage Leesville's lawyer in an active discussion of the underlying reasons for exercising the strikes.

No indication appears in the record of a relationship between that exercise and "the particular case to be tried," as required by *Swain* in that portion of the opinion which survives *Batson*. Leesville's self-serving decision to allow one of the three black jurors to remain cannot be interposed in opposition to the inference which the Circuit Court appeared not even to question, either in panel opinion or the *en banc* majority.

The decision of Judge Veron to stand aside thus constituted "action" as surely and completely as if the op-

[66] *Ibid*, at p. 994.

[67] J.A., at pp. 52-53.

position's lawyer had confirmed those inferences by explicit statement. His action in that regard cannot be supported by precedent or a review of the peremptory challenge's history, or in any way squared with the overriding policy of the United States to seek out racial discrimination in governmental processes and eradicate it whenever it is found.

CONCLUSION

The unmistakable position of Respondent is that no Court has the authority to tell him he cannot exercise peremptory challenges in a civil case in federal court based on group bias. Although Respondent did not, like the lawyer in Judge William's *U.S. v. Leslie*[68] hypothet, announce in open court the exercise was made for racial reasons, his position is indistinguishable.

No substantial arguments are posed against the proposition raised by Petitioner, and indeed none is likely to be. It is only through the guise of Respondent's asserted hypertechnical position regarding state action that he avoids a decision on the ultimate issue: that *Batson* has been, and of right must be, extended to lawyers in civil cases for the policy reasons previously announced.

The Court cannot adopt Respondent's position without expressly overruling *Fludd v. Dykes* and casting into serious question *Carter v. Board of Jury Commissioners of Greene County.* The continued efficacy of the most recent decision of this Court regarding the issue would also be assaulted since five Justices appeared at that time to be united in the proposition that the focus of the inquiry inevitably involves the rights of the excluded juror.[69]

The end is certainly just: the eradication of racial discrimination from the federal jury selection process. The

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[68] See Footnote 48, *supra.*

[69] *Harlan v. Illinois,* cited at Footnote 1, *supra.*

means are constitutional, whether they be cast in terms of the statutory authority of 42 U.S.C. 1981, this Court's supervisory jurisdiction, or the commandments of the Fifth and Fourteenth Amendments.

For all these stated reasons, then, the decision of this Court must be to overrule the *en banc* majority of the Fifth Circuit, reinstate the panel opinion, and remand the case to the district court for further action in accord therewith.

Respectfully submitted,

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[illegible] DONALD EDMONSON,

Petitioner,

versus

[illegible] CONCRETE COMPANY, INC.,

Respondent.

[illegible] Of Certiorari To The United States [illegible] Of Appeals For the Fifth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), governing the exercise of peremptory challenges by prosecutors in criminal cases should be extended to nongovernmental litigants in civil jury trials?

LIST OF PARTIES AND CORPORATIONS

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Plaintiff-Petitioner

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Defendant-Respondent

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LIST OF PARTIES AND CORPORATIONS – Continued

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No. 89-7743

In The

Supreme Court of the United States

October Term, 1990

THADDEUS DONALD EDMONSON,

Petitioner,

versus

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 860 F.2d 1308 (5th Cir. 1988). The decision of the U.S. Court of Appeals, Fifth Circuit, sitting *en banc*, is reported at 895 F.2d 218 (5th Cir 1990).

STATEMENT OF THE CASE

This case arises out of an accident which occurred on or about June 18, 1984, at Fort Polk, Louisiana. [R.1] The

petitioner **Thaddeus Donald Edmonson**, while engaged in the course and scope of his duties for Tanner Heavy Equipment Company, was caught between the back bumper of a cement truck and the front of a curb-and-gutter machine. The cement truck owned by respondent, **Leesville Concrete Company, Inc.**, was proceeding ahead of the curb-and-gutter machine at a slow pace up a slight incline, feeding cement from a chute on the cement truck into a hopper of the curb-and-gutter machine. [R.123] Petitioner's job was to make sure the cement flowed smoothly. The cement truck driver, an employee of the respondent, had stopped the truck and was starting to shift gears to move forward when the truck rolled back.

Edmonson sued Leesville Concrete Company, Inc., for negligence in the United States District Court for the Western District of Louisiana on October 19, 1984, alleging federal subject matter jurisdiction under 28 U.S.C. 1331 by virtue of the accident having occurred in a federal enclave.

Defendant-respondent denied that its employee was negligent and maintained, in the alternative, that the plaintiff was guilty of contributory negligence in positioning himself between the two vehicles despite warnings not to do so. Additionally, defendant maintained that the vast majority of plaintiff's injuries either did not exist or were unrelated to the accident.

The case came on for trial on July 27, 1987. The court conducted the jury voir dire. J.A. 13 et. seq. After the exercise by both counsel of their three peremptory challenges, counsel for the plaintiff-petitioner asked the court to note that two of the three jurors challenged by counsel

for defendant were black and that the plaintiff was black. J.A. 46-47. Plaintiff's counsel argued that the United States Supreme Court case of *Batson v. Kentucky*, 476 U.S. 79 (1986), applied to the selection of a petit jury in a civil trial and asked that counsel for the defendant articulate a race-neutral explanation for the exercise of his peremptory challenges. The trial Court denied the request, J.A. 49, holding that the principle announced in *Batson* was limited to criminal proceedings and also that there had been no discrimination in the jury selection procedure. J.A. 52-53.

On August 5, 1987, the jury rendered its verdict, finding the damages in the sum of $90,000.00 with 80% negligence on the part of Edmonson, and 20% negligence on the part of Leesville Concrete Company, Inc.

Petitioner appealed to the U.S. Court of Appeals for the Fifth Circuit. A three-judge panel issued its opinion on December 5, 1988, holding by a two-to-one majority that the United States Supreme Court's decision in *Batson v. Kentucky, supra*, applies to counsel representing a private individual in a civil action. On January 23, 1989, the Fifth Circuit granted a rehearing *en banc*. Then on March 1, 1990, the Fifth Circuit *en banc* affirmed the decision of the trial court in an opinion for nine judges with another two judges who specially concurred and a third judge who concurred in the result. Four judges dissented, including two judges who were in senior status.

SUMMARY OF ARGUMENT

The question whether *Batson v. Kentucky*, 476 U.S. 79 (1986), should be applied to nongovernmental litigants in civil cases is an important one to every attorney who litigates civil cases in federal and state courts. *Batson* held that a black defendant could in an individual criminal action establish a prima facie case of racial discrimination in the prosecutor's exercise of peremptory challenges against black members of the venire and thereby require the prosecutor to provide a "race neutral" reason for striking the juror. The holding was based on the equal protection clause of the Fourteenth Amendment, not the Sixth Amendment as *Batson* had argued.

The respondent in the case before the Court, Leesville Concrete Company, Inc., contends that *Batson* does not apply to civil cases. First, the "state action" doctrine as developed by this Court in a series of cases does not warrant the conclusion that the action of private attorneys is state action under the test of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Even in criminal cases, this Court has indicated that a public defender, though paid by the state, is not engaged in state action when representing a client in court. *Polk County v. Dodson*, 454 U.S. 312 (1981). If a state-paid public defender's actions before a trial judge do not constitute state action, it is difficult to understand how the exercise of peremptories by a privately-paid attorney representing a nongovernmental party before the same judge becomes state action.

A holding that *Batson* applies to nongovernmental parties in civil litigation necessarily will lead to a *de facto* application of a "cross-section of the community" standard to the petit jury. Although *Batson* involves equal

protection and *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990) has refused to incorporate *Batson* into the Sixth Amendment, the mechanics of jury-selection will result in the reverse: namely, incorporating the Sixth/Seventh Amendment cross-section standard into *Batson* and its equal protection rationale. That result would follow because, if extended to civil cases, *Batson* would be available to both plaintiffs and defendants. When each side accuses the other of a *Batson* violation involving different, identifiable groups, and especially with multiple parties plaintiff and defendant, the judge will be faced with an impossible situation. The judge will be required to inquire of and make decisions on a series of charges and counter charges. In such a situation, "there is every reason to believe that many commonly exercised bases for peremptory challenge would be unavailable." *Holland v. Illinois*, 110 S.Ct. at 810 (1990). As a practical matter, judges would severely limit and legislatures would probably eliminate peremptories. Petit juries then would reflect, as federal jury pools now do, the cross-section of the community standard.

While legislatures are always free to do so, this Court has declined to require the elimination of peremptories. As this Court has observed, it could be argued that "the requirement of an 'impartial jury' *compels* peremptory challenges." *Holland v. Illinois*, 110 S.Ct. at 808. In fact, the origin of the federal provision for peremptories in civil trials shows Congress intended them as a means to assure an unbiased jury.

For these and other reasons, the *en banc* decision of the Fifth Circuit Court of Appeals should be AFFIRMED.

ARGUMENT

The only issue in this case has been, and properly remains, whether the Constitution's guarantee of equal protection[1] as applied in *Batson v. Kentucky*, 476 U.S. 79 (1986), is implicated when peremptory challenges are exercised by nongovernmental parties in civil litigation.[2] Our answer is an empathetic no!

The plaintiff-petitioner raised and the trial court rejected the constitutional issue based on *Batson*. J.A. at 53. Petitioner's counsel mentioned the Sixth Amendment and, after the trial court ruling, corrected himself and specified the Seventh Amendment. J.A. at 3. On appeal one of the petitioner's briefs listed the Seventh Amendment, the right to an impartial jury, and the alleged unconstitutionality of 28 U.S.C. § 1870 as issues, but his

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[1] Although this case involves the equal protection component of the Fifth Amendment's due process clause, see *Bolling v. Sharpe*, 347 U.S. 497 (1954), this brief will generally refer to "state action" without distinguishing between state and federal action.

[2] The reference to "nongovernmental" rather than "private" parties distinguishes the status of the parties in this case from defendents in civil rights cases who may be employed as state officials, e.g., a sheriff. While certainly **not** urging that *Batson* applies to parties in civil rights litigation, we recognize that arguments can be made to distinguish their situation from that of the normal private litigant. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert denied*, 110 S.Ct. 201 (1989) and *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), *petition for cert. filed* (06/25/90) 59 U.S.L.W. 3053, apply *Batson* to civil actions brought under § 1983. *Reynolds*, but not *Fludd*, includes only governmental litigants within its holding. *Fludd* makes no such distinction.

argument did not actually discuss those as issues distinct from *Batson*.[3] Both the panel and the *en banc* opinions of the Fifth Circuit ruled only on *Batson*. In this Court, the petitioner has for the first time suggested reaching the same result by applying *Batson* to private parties as a matter of supervisory jurisdiction and an amicus[4] has urged this Court to find *Batson* implied in congressional statutes. The proposed supervisory[5] and statutory routes have been chosen apparently to avoid the fundamental constitutional difficulty of extending *Batson* to private parties, i.e., the absence of state action. The state action hurdle has become more significant since this Court declined last term to extend *Batson* to the Sixth Amendment in *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990).

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[3] Plaintiff-Appellant's "Supplemental or Alternatively, Reply Brief in the U.S. Court of Appeals for the Fifth Circuit" (6/24/88).

[4] "Brief Amicus Curiae in Support of Petitioner of the NAACP Legal Defense Education Fund, Inc., Lawyers' Committee for Civil Rights Under Law, and American Jewish Committee" (hereinafter Amicus Br.).

[5] To support the claim based on supervisory jurisdiction, the petitioner for the first time introduces into his argument, through his statement of facts, Petititioner's Brief at 6, a fanciful notion that the peremptory issue is intertwined with credibility issues before the jury. It is too late to raise these matters at this stage of the litigation. Moreover, the finding of no discrimination in the selection process by the trial judge is inconsistent with the petitioner's claim. See J.A. 52-53.

I. THE EXERCISE OF PEREMPTORY CHALLENGES BY NONGOVERNMENTAL LITIGANTS DOES NOT CONSTITUTE "STATE ACTION" AND THEREFORE *BATSON V. KENTUCKY* DOES NOT APPLY TO THIS CASE.

In some sense, everything that happens within a government's jurisdiction is "state action;" that is, government could be deemed the "but for" cause of every act or failure to act. Either the state has enacted a law that governs the particular action, or it has failed to enact such law. Of course, the constitutional doctrine on state action has never been extended to such an extreme statist position. In a free country government is not responsible for every, or even most, of the acts of private persons.

The appellant does not seriously address the state action question, which was the controlling issue both before the panel and the *en banc* court at the appellate level. That is, he mixes *Batson*, which was decided on the basis of the Fourteenth Amendment's equal protection clause, with the "cross-section of the community" standard of the Sixth Amendment. App. Brief at 8. He suggests that the Court should extend *Batson* even if state action does not exist. (" . . . [p]etitioner does not concede state action is required in any classic sense for his position to prevail." App. Br. at 25).

Although appellant's discussion of state action is lacking, the issue requires a full treatment in this case. Thus, given appellant's reliance on the views of Judge Rubin, author of the panel opinion and the dissent to the *en banc* opinion, and the Eleventh Circuit's decision in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), (see n. 2 *supra*), respondent will address those arguments directly.

See also Dunham v. Frank's Nursery & Crafts, Inc., No. 89-2109 (7th Cir.), 1990 U.S. App. LEXIS 21579 (12/12/90).

Judge Rubin's opinions concluded that the exercise of peremptory challenges by private parties constitutes state action.[6] In discussing the state action issue, his opinions cited the following cases from this Court, listed in date order: *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230 (1957); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Abney*, 396 U.S. 435 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978); *Polk County v. Dodson*, 454 U.S. 312 (1981); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); and *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988). The original panel opinion rested its finding of state action principally on *Shelley*, *Burton*, *Lugar*, and *Tulsa Professional*. 860 F.2d. at 1312. When the *en banc* court decided state action did not exist, Judge Rubin in dissent emphasized *Burton*, *Reitman*, and *Lugar* and distinguished *Blum*, *Evans*, and *Polk County*, relied upon by the majority. Each of these cases has been discussed below to demonstrate that state action is absent.

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[6] For present purposes, no distinction is made between cases discussing "state action," as used in the Fourteenth Amendment, and cases discussing "under color of law," as used in 42 U.S.C. § 1983. See *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 928, n. 9 (1982).

A. The Exercise of Peremptory Challenges by a Nongovernmental Party in a Civil Case Does Not Constitute "State Action" Under *Shelley, Burton* and Cases Through 1970.

Whenever one wants to find state action, or to extend the scope of governmental responsibility, *Shelley* and *Burton* are the citations of choice. Thus, two terms ago the dissent in *DeShaney v. Winnebago Co. Dept. of Soc. Serv.*, 489 U.S. 189 (1989), relied on these cases. The majority held that a state was not responsible under the Fourteenth Amendment due process clause for injuries inflicted by a father on his son in a case in which government officials had received complaints about the father's child abuse. The Court deemed the matter one for state tort law, not for a civil rights action. The dissent, however, thought "*Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), suggest that a State may be **found complicit** in an injury even if it did not create the situation that caused the harm." 489 U.S. at 207 (Brennan, J., dissenting) (emphasis added).

The very expansiveness of *Shelley* and *Burton* limits their usefulness as authority. As Professor Gunther has cautioned about *Shelley*,

> If Shelley were read at its broadest, a simple citation of the case would have disposed of most subsequent state action cases. Some seemingly "neutral" state nexus with a private actor can almost always be found . . . Given the entanglement of private choices with law, a broad application of Shelley might in effect have left no private choices immune from constitutional restraints.
>
> G. Gunther, *Constitutional Law* (11th ed. 1985) at 879.

As for *Burton*, Professor Tribe in a discussion of *San Francisco Arts & Athletics, Inc. ("SFAA") v. United States Olympic Committee*, 483 U.S. 522 (1987), points out how much its precedential value has declined.

> Burton's dwindling precedential power is illustrated by the fact that the majority [in *SFAA*] mentioned the case only in a short footnote – evidently added only after the Court's entire omission of the case had been pointed out by the dissent, see id. at 2991, n. 12 (Brennan, J., dissenting) – even though Burton formed a central part of the SFAA's state action argument.
>
> L. Tribe, *American Constitutional Law* (2nd ed. 1988) at 1701, n. 13.

Yet, even at their legitimate best, *Shelley* and *Burton* are weak authority for the result urged by petitioner in this case. In both *Shelley* and *Burton* the state entity **purposefully participated** in discrimination. In *Shelley* the Court had before it a racially restrictive covenant which it **knowingly** enforced. As Professor Tribe acknowledges, *Burton* "can be understood as entailing an inference of **purposeful** racial discrimination by government." Tribe at 1701, n. 13 (emphasis added). No one has suggested that the trial judge in this case, or federal district judges generally, knowingly participated in discrimination. Moreover, the trial judge exonerated respondent of the charge made by the plaintiff. ("The court finds **there is no discrimination**, no violation of the law in the selection procedure." J.A. at 52-53 (emphasis added)).

The importance of the mental element of purposeful participation in known discrimination for determining

the threshold issue of state action is what marks *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957), and *Reitman v. Mulkey*, 387 U.S. 369 (1967), and distinguishes them from similar fact situations. In *Board of Trusts*, a "Board of Directors of City Trusts" was appointed pursuant to a state statute and administered a trust and school established by the will of Stephen Gerard for "poor white male orphans." In a *per curiam* opinion, this Court held the refusal to admit blacks in accordance with the will violated the Fourteenth Amendment because the Board was a state agency. The state appointed the Board and administered the trust and the school with full knowledge of the discriminatory purpose of the trust. That knowing participation in the discriminatory action was the critical element is evident from comparing *Board of Trusts* to another trust situation addressed in *Evans v. Abney*, 396 U.S. 435 (1970).

Before *Abney*, however, this Court decided *Reitman v. Mulkey*, 387 U.S. 369 (1967). *Reitman* was among the most expansive views taken of state action. "After Reitman and before Abney, some commentators, noting that no modern Court decision had rejected a discrimination claim because of the state action barrier, suggested that the concept was moribund." Gunther at 894 (footnote omitted). Nevertheless, even *Reitman* recognized that purposeful discrimination, within the context of the particular facts, was controlling on the finding of state action. California voters repealed an open-housing statute by a constitutional referendum, neutral on its face. This Court agreed with the California Supreme Court's finding of state action on the basis that the constitutional

amendment would "significantly encourage and involve the State in private discriminations." *Id.* at 381. This amounted to more than the state's merely taking a "neutral position." *Id.* at 374-75. Here the discriminatory purpose of the neutral-appearing constitutional provision transformed the private into state action.

While even *Reitman* turned on the critical consideration of discriminatory purpose, *Evans v. Abney*, 396 U.S. 435 (1970), made the point in a way particularly applicable to the present case. *Abney* involved a park given to the City of Macon, Georgia, in trust for whites only. In an earlier decision, *Evans v. Newton*, 382 U.S. 296 (1966), this Court had applied *Pennsylvania v. Board of Trusts, supra*, to hold that the park could not be operated in a racially discriminatory fashion. Thereafter, the Georgia courts ruled that because the intent of the trust could not be implemented, the operation of state law on trusts required the property be returned to the heirs of the testator. This Court affirmed the Georgia decision. The majority in *Abney* found the actions of the testator were not attributable to the judges because they lacked any racially discriminatory motive.

> In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will.
>
> 396 U.S. at 445.

Certainly, construing the will constituted state action; but the discriminatory acts of the testator, a private person, did not.

> The **only choice** the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind.
>
> *Id.* at 446 (emphasis added).

Abney turns on the state court's neutral administration of nondiscriminatory law. By this standard a judge's role vis-a-vis peremptory challenges cannot possibly constitute state action. The peremptory process involves even less choice than the Georgia judges had in *Abney*; the trial judge **has no choice.** Not only is the peremptory statute nondiscriminatory, it is also nondiscretionary. The trial judge **must grant** the challenge. Moreover, if demonstrable proof of discriminatory intent by the private party existed in *Abney* but was not attributable to the judge, why should the **mere allegation** of discriminatory intent made against a private party make the judge responsible for the unproven motives? As elaborated below, the conduct of the private party is not "fairly attributable" to the trial judge.

B. The Actions of the Private Litigants are not "Fairly Attributable" to the State: *Lugar, Tulsa Professional,* and Post-1970 Cases.

Before the early 1970s, it might have seemed that state action could be found wherever the state failed to root out discrimination or that the state action requirement might just wither away. With *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), a new era began in which "the

state action barrier remains and, indeed, has gained new strength." Gunther at 894. *Moose Lodge* refused to find state action on the granting of a state liquor license to a private club that excluded blacks. A contrary decision would have been supportive of the approach urged by the petitioner in the case *sub judice*. To find support in the post-1970 Supreme Court cases Judge Rubin's opinions have had to rely on nonequal-protection cases. In these cases, the process of "sifting facts and weighing circumstances" to determine state action, *Burton*, 365 U.S. at 722, necessarily did not involve the presence or absence of purposeful discrimination.

Jackson v. Metropolitan Edison Co., *Lugar*, and *Tulsa Professional* were due process cases. *Jackson* and *Lugar* have been grouped according to several theories about state action, including the so-called "public function" line of state action cases. See j. E. Nowak, R. D. Rotunda, and J. N. Young, *Constitutional Law* (3d ed. 1986) at 426-32 (hereinafter Nowak). *Jackson* "restricted the scope of public function analysis." *Id.* at 429. That happened again in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), which like *Lugar* was a debtor-creditor case. The results in *Flagg* and *Lugar*, however, conflicted with each other and demonstrated the "difficulty of predicting the outcome" in such cases. Nowak at 432. In *Flagg Brothers, Inc. v. Brooks*, this Court "held that there was no state action in the sale of a debtor's goods by a warehouseman who had the goods in his possession and who had a lien on the goods for unpaid storage charges." *Id.* at 430 (footnote omitted). On the other hand, *Lugar* held "that a debtor could challenge, as a violation of due process, the state procedure by which a creditor secured a pretrial writ of attachment

against his property based upon the creditor's ex parte petition." *Id.* at 432. What distinguished *Lugar* from *Flagg* was "[t]he involvement of the state judicial system in the issuance of the writ, and the involvement of the county sheriff in the execution of the writ . . . " *Id.*

As *Lugar* states, the question of state action turns on whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State." 457 U.S. at 937. This involves a two-part test to determine "state attribution." "[T]he first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.* at 939. The "second question" as formulated in *Lugar*, is whether, under the facts of the case, the private parties "may be appropriately characterized as " 'state actors.' " Under this test, as Professor Nowak states, the private party would have to be performing a governmental function or be taking direction from a governmental agency.

> A majority of the current justices appear to believe that no private sector agency should be subjected to constitutional limitation of its autonomy unless it performs a delegated governmental function or is taking actions under the direction of state authorities.
>
> Nowak at 430 (footnote omitted).

Although written before *Tulsa Professional*, 485 U.S. 478 (1988), was decided, Professor Nowak's formulation of the test has not been altered by this or later cases. In *Tulsa Professional*, the Court held that an Oklahoma probate statute violated the Fourteenth Amendment due process clause because it failed to require notice by mail to

known creditors of a decedent's estate. The statute provided for the executor or executrix to give notice to the creditors of the deceased. 485 U.S. at 487. In this case, "the court **ordered** [the executrix] to fulfill her statutory duty by **directing** that she 'immediately give notice to the creditors,' " *Id.* (emphasis added), which she did through publication. This Court found the probate court's "involvement . . . so pervasive and substantial that it must be considered state action." *Id.* Here the probate court actually directed the private party. Moreover, the private party was fulfilling a "government function" in providing notice.[7]

Certainly a civil trial involves government action by virtue of the fact that a judge conducts the trial, but it does not follow, therefore, that every action occurring during trial is properly characterized as state action. As Professor Nowak observes, "[t]he *Shelley* decision should not be taken as holding that any judicial decree which disadvantages members of a racial minority violates the fourteenth amendment." Nowak at 434. The *en banc* opinion is correct in relying on the statement in *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) that "a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed to be that of the State" and that "[m]ere approval of or acquiescence in the initiatives of a

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[7] The basic requirement of due process has been the insistence that the state ensure its judicial procedures provide notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

private party is not sufficient to justify holding the State responsible . . . under the . . . Fourteenth Amendment' " 895 F.2d at 221-22, n. 8.

Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989), viewed the trial judge's role in a way contrary to *Blum*.

> In overruling the objection [to the use of peremptory challenges on racial grounds], which informed the court that the peremptory challenger **may** be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes. Because the trial judge constitutes the discriminatory state actor under the equal protection clause, we conclude that there is no constitutional bar to the application of *Batson* to a civil suit.
>
> 863 F.2d at 828 (emphasis added).

In so concluding, the Eleventh Circuit found state action where none existed. As one commentator remarked about *Fludd*,

> The trial judge's search for state action is confined to occurrences that have already taken place. The court's focus should normally be on the conduct of the party making the peremptory challenge, in the light of all the relevant circumstances. The relevant actions and circumstances include those of the courtroom, the trial process, the surrounding judicial system, and the trial judge's own role and decisions up to the point of objection, including his excusing of those stricken jurors. If the facts do not supply sufficient state action, the trial court cannot supply state action by considering the possible incorrect ruling it would make in denying the *Batson* objection. If at the time of the objection there is

> insufficient state action, from whatever source, any objection to a peremptory challenge based on an alleged denial of equal protection must be overruled. The Eleventh Circuit's focus on the trial court's overruling of the defendant's objection and proceeding to trial as an element of the necessary state action, therefore, seems mistaken.
>
> Wright, "Litigating the State Action Issue in Peremptory Challenge Cases," 13 *American Journal of Trial Advocacy* 573, 583-84 (1989).

Moreover, the view of a trial judge's action taken in *Fludd* was inconsistent with this Court's decision in *National Collegiate Athletic Assoc. ("NCAA") v. Tarkanian*, 488 U.S. 179 (1988). That opinion stressed that a private party (the NCAA) did not become a state actor simply because state institutions participated in rule-making by the private party. As this Court said:

> [T]he question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action.
>
> 488 U.S. at 193.

Applying *NCAA* to the present case, the question should be whether the trial court's action in compliance with counsel's exercise of peremptories turned the private counsel's action into the court's action. If *NCAA* is applied, the answer is No!

NCAA's reliance upon *Polk County v. Dodson*, 454 U.S. 312 (1981), 488 U.S. at 196, was significant. *Polk County* held "that a public defender does **not** act under color of

state law when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding." 454 U.S. at 325 (footnote omitted) (emphasis added). *Polk County* acknowledged that a public defender acts under color of state law "when making hiring and firing decisions on behalf of the state" and might do so when "performing certain administrative and possibly investigative functions." *Id.* Nevertheless, this Court took the view that attorneys, other than the prosecutor, act in a private capacity when performing functions at trial. For this Court to conclude that the trial judge's allowance of peremptory challenges is state action would logically require a finding of state action when the trial judge allows peremptories by a criminal defendant. Although *Batson* left the issue open, the reaffirmance of *Polk County* in *NCAA* should have settled fairly well that criminal defense and, by implication, other nongovernmental attorneys are not state actors.

A discussion of state action was unnecessary in *Batson* given the presence of the prosecutor. Moreover, on this issue *Batson* did not over-rule *Swain v. Alabama*, 380 U.S. 202 (1965), which had already applied the equal protection clause to the prosecutor's use of peremptory challenges. Although *Batson* overruled *Swain* in part, it built on the principle in *Swain* that equal protection applies to the actions of the prosecutor. In announcing the principle, *Swain* presumed that the equal protection clause did **not** apply to defense counsel.

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. **The ordinary exercise of challenges by the defense counsel does not, of course, imply purposeful discrimination by state officials.**
>
> *Swain v. Alabama*, 380 U.S. 202, 227 (1965) (emphasis added).

Likewise, the action of attorneys for nongovernmental parties in civil litigation is not state action.[8]

II. CONFUSION OF EQUAL PROTECTION WITH OTHER CONSTITUTIONAL PROVISIONS WILL LEAD TO A CROSS-SECTION STANDARD IN THE PETIT JURY.

As in other cases involving peremptories, those who would extend *Batson* to this case have confused the equal protection and right to jury trial issues. The original panel opinion, without referencing the Sixth Amendment, seemed to have been influenced by cases applying the Sixth Amendment to the discriminatory use of peremptory challenges.[9] (Although the Seventh Amendment, not

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[8] Whether this Court would follow *Swain* on this point in a § 1983 action for a defendant acting under color of state law is not an issue presented by this case.

[9] Prior to the original argument of this case in the Fifth Circuit, the court requested counsel to be prepared to discuss several cases. Three of the cases listed under the heading of state action were the principal cases on which the opinion rested its finding of state action. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); and

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the Sixth, governs civil trials, the Sixth Amendment discussion would, if applicable, extend by analogy to the Seventh Amendment.) This confusion should have, but has not, been put to rest by *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990).

A. The Equal Protection Rationale of *Batson* Differs from a Sixth or Seventh Amendment Rationale.

The original panel opinion in this case was the first federal appellate court to apply *Batson* to civil trials. Its operating assumptions were not based on *Batson* as evinced by its failure to mention intent in its statement of *Batson*'s holding. Thus, the initial extension of *Batson* to civil cases sprang from a blurring of an equal protection versus a Sixth or Seventh Amendment rationale, as implicit in the following:

> In *Batson*, the Supreme Court held that the equal protection clause of the Fourteenth Amendment forbids the prosecutor in a state criminal action to exercise peremptory challenges to remove members of the defendant's race from the venire.
>
> 860 F.2d at 1310.

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Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988). Another case, *People v. Gary M.*, 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (1988), was not listed under state action but under "jury challenges." The panel opinion referred to *Gary M.* once, quoting it, however, in the section discussing state action. 860 F.2d at 1312 and n. 23. Following precedent in the Second Circuit, *Gary M.* held that both the Sixth Amendment and the Equal Protection clause make criminal defense attorneys' peremptory challenges subject to challenge by the prosecutor for discrimination. See also n. 14, *infra*.

Of course, *Batson*'s holding involved more than the removal of minorities from a criminal jury panel. As an equal protection case, intentional discrimination was an essential element. *Washington v. Davis*, 426 U.S. 229 (1976). Thus *Batson* concerned only removals based on purposeful discrimination, demonstrated through a long course of conduct by prosecutors.

Batson built on *Swain*, reversing it in part only. In *Swain*, this Court "warned prosecutors that using peremptories to exclude blacks on the assumption that no blacks could fairly judge a black defendant would violate equal protection." 476 U.S. at 101 (White, J., concurring). From *Swain* to *Batson*, "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remain[ed] widespread." *Id*. The record in criminal cases of *systematic* exclusion was the foundation for an inference of discriminatory intent, which together with the state action of the prosecutor provided the basis for the equal protection holding in *Batson*.

Repeated attempts have been made to break *Batson* away from its equal protection holding. Shortly after *Batson* there was an exchange between Justices Brennan and O'Connor in *Brown v. North Carolina*, 107 S.Ct. 423 (1986), a memorandum decision denying certiorari. *Brown* was a capital case in which the prosecutor had used the peremptories to eliminate persons who had reservations about the death penalty but who were not subject to challenge for cause. Justice Brennan insisted that *Batson*

imposed restrictions on the state's use of peremptories beyond the equal protection clause. ("The state, however, misses the wider significance of *Batson*: that the broad discretion afforded prosecutors in the exercise of peremptory challenges may not be abused to accomplish *any* unconstitutional end." 479 U.S. at 944-45.) Justice O'Connor strongly disagreed, stating:

> Outside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike a juror without giving any reason applies. Because a juror's attitudes towards the death penalty may be relevant to how the juror judges, while, as a matter of law, his race is not, this case is not like *Batson*.
>
> 479 U.S. at 942.

This Court's choice in *Batson* of the equal protection rationale was quite deliberate. Batson had argued the Sixth Amendment, not the equal protection clause. As Chief Justice Burger's dissent emphasized, the Court "granted certiorari to decide whether [*Batson*] was tried 'in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community.' " 476 U.S. at 112 (Burger, C.J., dissenting.) At oral argument, Batson "expressly declined to raise" the equal protection claim. *Id.* (See excerpt from transcript. *Id.* at 113-15.) In choosing to rest the decision on a ground not argued, as Chief Justice Burger's dissent observed, "the Court depart[ed] dramatically from its normal procedure without any explanation." *Id.* at 115. This was especially peculiar because, as one commentator notes, "the Sixth Amendment approach seems more consistent with the rationale of *Batson*, which turned on the effects of exclusion on those jurors being removed, rather than the

effects of exclusion on the defendant's trial." W. Pizzi, "*Batson v. Kentucky*: Curing the Disease but Killing the Patient," 1987 *Sup. Ct. Rev.* 97, 117 (hereinafter, "Pizzi").

Had *Batson* been decided on Sixth Amendment grounds, several things would have followed. First, a Sixth Amendment approach to *Batson* most assuredly would have been applicable also to defense counsel, an issue avoided in *Batson*, because the Sixth Amendment involves no "state action" hurdle. Moreover, as the Fifth Circuit observed in *United States v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986), *vacated and remanded*, 479 U.S. 1074 (1987), in reference to cases which at least in part were based on the Sixth Amendment, "every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be prohibited."

More importantly, a decision based on the Sixth Amendment (and by extension, the Seventh Amendment) would have required judicial regulation of the racial mix in the jury. Under the Sixth Amendment cases the party claiming a violation of the amendment need not be of the same race as the excluded juror. *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990); *Duren v. Missouri*, 439 U.S. 357, 359, n. 1 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972). This is consistent with the Sixth Amendment's cross-section standard, which has evolved to become a near mirror-imaging of the racial composition of the community on the jury.[10]

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[10] *See Castaneda v. Partida*, 430 U.S. 482 (1977).

This Court has emphatically rejected the Sixth Amendment approach. *Lockhart v. McCree*, 476 U.S. 162 (1986), did so only five days after this Court avoided the Sixth Amendment issue in *Batson*.[11] In holding that the Constitution does not prohibit states from "death qualifying" juries in capital cases, this Court distinguished between the jury venire, to which the cross-section standard applies, and the petit jury, which is not subject to the cross-section standard:

> We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren v. Missouri*, 439 U.S. 357, 363-364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02, 42 L.Ed.2d 690 (1975). ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population"), *cf.* Batson v. Kentucky, ___ U.S. ___, ___, n. 4, 106 S.Ct. 1712, 1716, n. 4, 89 L.Ed.2d ___ (1986) (expressly declining to address "fair cross-section" challenge to discriminatory use of peremptory challenges). The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury, see *id.* at ___, n. 6, 106 S.Ct., at 1717, n. 6.

476 U.S. at 173-74 (footnote omitted.)

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[11] Batson had urged the Court to apply the Sixth Amendment by adopting the reasoning of *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). Based on state constitutional analogs to the Sixth Amendment, these state cases reasoned that under the Sixth Amendment the petit jury should approach as closely as possible **proportional representation**. Both *Wheeler* and *Soares* postulated a "petit jury that is 'as near an approximation of the ideal cross-section of the community as the process of random draw permits.' " 387 N.E.2d at 516, quoting *Wheeler*, 583 P.2d at 762. See also n. 14 for references to some federal appellate cases following the Sixth Amendment approach.

Last term in *Holland v. Illinois*, 110 S.Ct. at 808 (1990), this Court followed *Lockhart*, quoting in part from the above language.

The quotation from *Lockhart* points up the tension with *Batson*. *Batson* reaffirms that juries are not required to approach a mirror-image of the community (" . . . we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various destructive groups in the population,' " 476 U.S. at 85, n. 6.) Yet, some of *Batson*'s language, taken to logical extremes, would produce just that result. By relying on the equal protection clause and the requirement of purposeful discrimination, though, *Batson* apparently attempts to avoid such a consequence. *Batson* should be read in light of *Lockhart* because "[t]he Court's decision to steer clear of the Sixth Amendment and the fair cross-section theory was no doubt heavily influenced by the fact that, at the time *Batson* was under consideration, it was wrestling with *Lockhart v. McCree*, 106 S.Ct. 1758 (1986) . . . " Pizzi at 121.

As the Court recognized in *Holland*, too broad a reading of *Batson* will result in requiring the mirror-imaging

of the community. For that reason, in part, this Court declined the invitation to "incorporat[e] into the Sixth Amendment the test . . . devised in *Batson* . . . " *Holland v. Illinois, supra* at 806. In rejecting the Sixth Amendment's cross-section standard, *Holland* followed *Lockhart*, which stated:

> We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound . . .
>
> 476 U.S. at 174.

B. This Court Should Reject What, In Practice, Will Require a "Cross Section" in the Petit Jury

The panel opinion in this case nowhere referred to proportional representation on juries. Nevertheless, that would not have prevented proportionality from being the ultimate result. In *Teague v. Lane*, 489 U.S. 288 (1989)[12]

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[12] In *Teague v. Lane*, 489 U.S. 288 (1989), the petitioner had urged, *inter alia*, that the Sixth Amendment's fair cross-section requirement should be applied to the petit jury. Justice O'Connor determined "that the rule urged by the petitioner should not be applied retroactively to cases on collateral review, [and therefore] decline[d] to address the petitioner's contention." *Id.* at 299. On this part of the opinion Justice O'Connor wrote for a plurality of four, while writing for a majority on other parts of the opinion. Justice White disagreed with Justice O'Connor on the issue of retroactivity to cases on collateral review but concurred in the judgment. Justice Brennan, in dissent, agreed with the petitioner's Sixth Amendment claim, contending it was little different from *Batson*'s Equal Protection holding. *Id.* at 341-42. Justice Brennan disputed with Justice O'Connor over whether recognizing the Sixth Amendment claim would require **proportional representation** of the races on juries. Justice O'Connor insisted that it would:

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and in *Holland*, 110 S.Ct. at 809, this Court has noted that even a disclaimer of any intention to require proportional

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The dissent asserts that petitioner's fair cross section claim does not embrace the concept of proportional representation on the petit jury. Post, at ___ - ___. Although petitioner disavows such representation at the beginning of his brief, he later advocates adoption of the standard set forth in *Duren v. Missouri*, 439 U.S. 357 (1979), as a way of determining whether there has been a violation of the fair cross section requirement. See Brief for Petitioner 15-16. In order to establish a prima facie violation of the fair cross section requirement under *Duren*, a defendant must show: (1) that the "group alleged to be excluded is a 'distinctive' group in the community;" (2) that the representation of the group "is not fair and reasonable in relation to the number of such persons in the community;" and (3) that the underrepresentation of the group "is due to systematic exclusion of the group in the jury selection process." 439 U.S. at 364. The second prong of *Duren* is met by demonstrating that the group is underrepresented in proportion to its position in the community as documented by census figures. *Id.* at 364-366. If petitioner must meet this prong of *Duren* to prevail, it is clear that his fair cross section claim is properly characterized as requiring "fair and reasonable" proportional representation on the petit jury. Petitioner recognizes this, as he compares the percentage of blacks in his petit jury to the percentage of blacks in the population of Cook County, Illinois, from which the petit jury was drawn. See Brief for Petitioner 17-18 (arguing that blacks were underrepresented on petitioner's petit jury by 25.62%) **In short, the very standard that petitioner urges us to adopt includes, and indeed requires, the sort of proportional analysis we declined to endorse in** *Akins v. Texas*, 325

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representation will not necessarily suffice. Similarly *McCleskey v. Kemp*, 481 U.S. 279 (1987), demonstrated concern not to knock the dominoes that end in proportionality. *McCleskey* rejected equal protection and Eighth Amendment challenges to Georgia's capital punishment statute under which persons who had murdered whites and murderers who were black more frequently received the death penalty. It emphasized it would not give significance to statistical disparities in the criminal justice system regarding race beyond the limited exception of jury venires[13] because the "claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." 481 U.S. at 314-15. Specifically, the case noted,

> [T]he claim that his [McCleskey's] sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexpected discrepancies that correlate to membership in other minority groups, and even to

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U.S. 398, 403 (1945), and *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

489 U.S. at 301-02, n. 1 (emphasis added).

[13] "The Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district.

. . .

But the nature of the capital sentencing decision, and the relationship of the statistics to the decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases." 481 U.S. 279 (1987) at 293-94.

gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could – at least in theory – be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decision making.

481 U.S. 279 (1987) at 315-18 (footnotes omitted).

Significant expansion of *Batson* along any of several lines could lead to the kind of proportional representation rejected by a majority of this Court. *Holland* has closed the Sixth Amendment avenue which was being used for claims coming from other groups.[14] 110 S.Ct. at 810. Nevertheless, new possibilities are presented this

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[14] Prior to *Holland*, at least, *Batson* was being extended through the Sixth Amendment in some circuits. See *Alvarado v. United States*, ___ U.S. ___, 110 S.Ct. 2995 (1990). For example, *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988), *affirming* 673 F. Supp. 96 (E.D.N.Y. 1987) upheld a decision that Italian-Americans are a "cognizable racial group" under *Batson*. While the district court was "satisfied beyond a reasonable doubt that the prosecutors did not engage in purposeful discrimination," 673 F. Supp. at 105, the case compares the percentage of jurors of Italian descent on the defendant's jury with the proportion of Italian-Americans in the population of the locale in which the

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term as the Court has before it, in addition to this case, several other jury selection issues involving *Batson*.[15]

Batson itself need not involve proportionality in the petit jury because the inquiry is limited to the race of the defendant. Gender, *see United States v. Gross*, ___ F.2d ___ (9th Cir.), 48 Cr. L. R. 1001 (10/3/90), and multiple races among defendants in the same case may complicate

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case was tried. The decision follows language in *Roman v. Abrams*, 822 F.2d 214, 229 (2d Cir. 1987), which makes a *Batson*/Sixth Amendment challenge turn not on purposeful discrimination but on the proportion of representation of the "cognizable group" on the actual jury.

> Where, however, the actions of the prosecutor have not succeeded in excluding the targeted group and have not reduced the petit jury representatives of that group dramatically below the group's percentage in the venire or in the population of the community, it is difficult to see that the defendant has in fact been denied the possibility that the Sixth Amendment guaranteed him. Rather, if that group is not significantly underrepresented, it appears that the possibility constitutionally guaranteed to the defendant has come to fruition and that the defendant has therefore not been injured by the prosecutor's efforts to eliminate the cross-section possibility.
>
> 822 F.2d at 229.

[15] *Powers v. Ohio*, No. 89-5011, argued 10/9/90 (whether a white defendant has standing to raise an equal protection clause challenge under *Batson* to the striking of a black juror); *Hernandez v. New York*, No. 89-7645 (whether a prosecutor's explanation of a challenge of an Hispanic juror was "race neutral" under *Batson*); *Ford v. Georgia*, No. 89-6796, argued 11/6/90, (whether defendant properly preserved a *Batson* claim).

matters somewhat. With a few expansions of *Batson*, however, the tendency toward proportionality may be unstoppable. If each side in a criminal or civil trial is able to apply *Batson* to the other side, then two or more racial groups would come into conflict. In cases of multiple plaintiffs or defendants, many potential racial, ethnic, and other groups may be involved. If standing under *Batson* and equal protection (*See Powers v. Ohio*, No. 89-5011, argued 10/9/90, on equal protection grounds as opposed to the Sixth Amendment, see *Holland, supra*, at 805) should be relaxed to allow a defendant to challenge the state's striking of a racial group other than his own, the number of racial groups would become limited only by the number in the population. A court faced with challenges involving multiple racial and other groups would be driven to enforcing a near mirror-image of the community on the jury, even though *Batson* declined to impose such a requirement. See *Batson*, 476 U.S. at 85, n. 6.

A particular problem which affects the respondent, **Leesville Concrete Co., Inc.**, is the manner in which *Batson* would apply to corporate parties. As the original panel opinion noted, the plaintiff in this case, a black man, used all of his challenges to remove white jurors. If *Batson* applies in civil cases, it should be available to Leesville and other corporations in the future. *But see Dias v. Sky Chefs, Inc.*, No. 89-35778 (9th Cir.), 1990 U.S. App. LEXIS 20587 (11/27/90). As this Court has acknowledged, corporations are "persons" protected under the Fourteenth Amendment equal protection clause. See *Santa Clara County v. So. Pac. R.R.*, 118 U.S. 394 (1886). The respondent wonders how the race of the corporation

would be determined. Would it be the race of the chief executive officer, the board of directors, or the shareholders? With a multiracial board or group of stockholders, would the corporation get the benefit of all the races or merely of the majority race represented on the board or among the stockholders? As these questions suggest, application of *Batson* quickly would have more wide-reaching consequences on the composition of civil juries than of criminal juries.

The reasons for rejecting a cross-section requirement in the jury are not primarily for administrative convenience, nor even to preserve the peremptory challenge – although such concerns are not minor. The more important reason is "the divisive implication that such a concept implies: that without such a system jurors would be unable to be impartial." Pizzi at 120, n. 150. As stated in *Ristaino v. Ross*, 424 U.S. 589, 596, n. 8 (1976):

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption . . . that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.

See also *Richmond Va. v. J. A. Croson*, 488 U.S. 469 (1989).

Moreover, for trial judges to involve themselves in balancing the racial mix of the petit juries would violate congressional legislation on jury selection. Congress has established the jury selection procedures, discussed below, which both carefully guarantee the representativeness of the jury pool and also preserve peremptories. This system has been designed to eliminate discretion and subjective factors, even by judges, except as specifically provided. To inject judicial discretion into this process,

runs the risk of creating new opportunities for discrimination in the jury compilation – a consequence Congress sought to guard against in the Jury Selection and Service Act of 1968.

III. THE STATUTORY PROVISION FOR PEREMPTORY CHALLENGES IN CIVIL CASES IS QUITE CONSISTENT WITH ANTIDISCRIMINATION STATUTES AND POLICIES.

Failing the constitutional argument, the petitioner advances no legitimate rationale for overturning the *en banc* opinion of the Fifth Circuit. Unless constitutionally defective, the congressional statute giving each party three peremptory challenges, 28 U.S.C. § 1870, must be given effect.[16] Its language is mandatory: "In civil cases, each party **shall** be entitled to three challenges"

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[16] Petitioner suggested at one point that 28 U.S.C. § 1870 is unconstitutional, but he has not pursued that argument. Nor could he do so successfully. Despite Justice Marshall's statement concurring opinion in *Batson* that the "goal [of ending racial discrimination in the jury-selection process] can be accomplished only by eliminating peremptory challenges entirely," 476 U.S. at 103 (Marshall, J., concurring), there seems to be no constitutional basis for such a view. As the majority noted,

> "Nor do we think that this historical trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecution and trial judges will not perform conscientiously their respective duties under the Constitution."
>
> 476 U.S. at 99, n. 22.

(emphasis added). The only discretion given to the trial judge involves multiple parties, in which case the judge may decide whether to allow additional peremptories.[17]

28 U.S.C. § 1870 is neutral on its face. The party exercising the challenge not only need not, but does not and should not, give a reason for doing so. Thus, if an attorney strikes a potential juror whose demeanor appears to him to suggest untrustworthiness, the attorney would not and should not volunteer that he is striking the juror because he thinks him untrustworthy. A peremptory challenge is not peremptory (i.e., "self-determined, arbitrary, not requiring any cause be shown;" *Black's Law Dictionary* (6th ed.)) if a reason is given. In criminal cases a prosecutor may be called upon to give a reason and in that instance the challenge is not actually peremptory. This limitation imposed by *Batson* on a prosecutor's use of peremptories is purely a constitutional one. To acknowledge that the present case does not implicate the underpinnings of *Batson* as an amicus urges[18] and as petitioner comes close to doing,[19] amounts to conceding the appeal.

The statutory arguments of the petitioner and the amicus lack merit quite apart from the fact that the appellant cannot prevail except on the constitutional issue.[20]

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[17] "Several defendants or several plaintiffs may be considered as a single party for purpose of making challenges, or the cour may allow additional peremptory challenges and permit them to be exercised separately or jointly." 28 U.S.C. § 1870.

[18] Amicus Br. at 7-10

[19] *See* Petitioner's Brief at 25 ("At the outset it should be obvious petitioner does not concede state action is required in any classic sense for his position to prevail").

[20] In urging this Court to avoid the constitutional issue, the amicus brief contended the "original panel decision in

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The contention that 28 U.S.C. § 1870 "must be construed in light of the more specific provisions of federal laws prohibiting racial discrimination in jury selection," Amicus Br. at 5, conflicts with basic principles of statutory construction. Not only is section 1870 clear and unambiguous but it conforms with and is confirmed by other statutes with quite specific provisions governing nondiscriminatory jury selection. What the amicus calls for is not construction, but either rewriting the statute or placing a constitutional limitation on the statute without labeling it as such. Thus, the amicus writes: "We contend that section 1870 should be construed in a manner consistent with the constitutional rule in *Batson*." Amicus Br. at 13.

A. Section 1870 is Consistent with the Jury Selection and Service Act of 1968.

Section 1870 on its face does not conflict with any antidiscrimination statute; in particular, not with sections of the Jury Selection and Service Act of 1968, i.e., §§ 1861 or 1862 of Title 28.[21]

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petitioner's favor . . . relied at least in part on a construction of section 1870," citing 860 F.2d at 1312. In the paragraph to which the amicus referred, the panel was not construing the statute but observing that it would be unconstitutional if it discriminated on its face.

[21] The amicus also discusses two other statutes: 42 U.S.C. § 1981 and 18 U.S.C. § 243, which are not here specifically addressed. The Jury Selection and Service Act of 1968, of which §§ 1861 and 1862 are a part, is one way of protecting those rights specified in 42 U.S.C. § 1981

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Section 1861 provides in part:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

Section 1862 provides:

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.

Read in isolation, section 1861 might seem to require elimination of peremptories because it does not mention them as an exception to the policy of "grand and petit juries **selected at random** from a fair cross section of the community" (emphasis added). The section seems to require the composition of the petit jury itself be random. Given that the exercise of peremptory challenges prevents randomness, see *Holland v. Illinois*, 110 S.Ct. at 807, peremptories would seem inconsistent with the policy of the Jury Selection and Service Act stated in § 1861. As evident from section 1866, Title 28, part of the same act, no conflict does exist, however. The jury panel is randomly drawn from the jury wheel. 28 U.S.C. § 1866 (a)

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> All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

18 U.S.C. § 243, which is applicable only to certain state actors, does not add anything to this case not covered in the equal protection issue. *See* n. 6, *supra*.

and (b). But section 1866(c)(3) also provides for peremptory challenges.

> "No person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: **provided**, that any person summoned for jury service may be . . . (3) excluded on peremptory challenge as provided by law."

Thus, any question about construing § 1870 in light of § 1861 has been pretermitted by § 1866. Likewise, § 1866(c)(3) constitutes a clear exception, if one is needed, to the statement in § 1862.

In addition to the lack of conflict with the anti-discrimination statutes, the exercise of supervisory jurisdiction would be particularly inappropriate in this case given the ruling of the trial judge. After addressing the constitutional issue, the trial judge also found that there had been no discrimination in the jury-selection process: "The court finds there is no discrimination, no violation of the law in the selection procedure.[22]

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[22] The enlarged part of the trial judge's remarks are as follows:

> But again, for the record, so that the record is clear, so that the parties in the event that they want to appeal in the qualifying of eighteen jurors in order to pick twelve of the eighteen qualified, three were of the black race, the same as the plaintiff. The plaintiff certainly did not challenge any of the black jurors. He challenged nothing but white jurors. The defendant challenged two of the three black jurors and a white juror. The court finds there is no discrimination, no violation of the law in the selection procedure. And the motion to have the defendant articulate the reasons why he challenged the two

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As counsel for the defendant-respondent indicated to the trial judge, if he had been exercising his challenges on the basis of race (which he was not) he would have used his three challenges to strike all three black venire persons.[23] When the selection process was complete (which occurred before the plaintiff-petitioner without warning raised his claim based on *Batson*, see J.A. at 48-9), the jury of twelve included one juror who was black.

B. CONGRESS DEEMED PEREMPTORY CHALLENGES IN CIVIL TRIALS NECESSARY FOR A FAIR AND IMPARTIAL JURY.

If Congress wishes to rewrite or eliminate section 1870, it is free to do so. See *Frazier v. United States*, 335 U.S. 497, 505, n. 11 (1948). In origin, purpose, and effect, however, section 1870 is itself an antidiscrimination provision.

1) The Reconstruction Congress Initiated Peremptory Challenges in Civil Cases as a Means to Eliminate Bias from the Jury.

The origin of peremptory challenges in civil cases was entirely different from that in criminal cases. The

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> black jurors is denied. I make this on the record so that in the event of an appeal, the record will be clear as to the court's ruling.
>
> J.A. at 52-53.

[23] J.A. at 54, where respondent's counsel stated: "As an aside, I would note that both plaintiff and defendant were accorded three challenges. There were three blacks. And if it were discriminatory action, the three, my three challenges could have been asserted against the three blacks. That had nothing to do with the matter. I simply threw that in as an aside remark."

only form of peremptory challenge recognized under the common law was that provided to defendants in criminal cases; as a practical matter, even it was largely limited to defendants in criminal cases. *Swain v. Alabama*, 380 U.S. 202, 211-13 and n. 9 (1965). Under the common law, no party in a civil case was accorded any peremptory challenges. J. Profatt, *A Treatise on Trial by Jury*, §§ 155, 163 (1877); *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 331 Mass. 366, 119 N.E. 2d 169, 172 (1954); *Sackett v. Ruder*, 152 Mass. 397, 25 N.E. 736, 738 (1890); and *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N.W. 53, 55 (1896). Thus, when the Constitution was adopted, the use of peremptory challenges in civil cases was virtually unknown. Profatt, § 163. Legislation in 1790 authorized peremptory challenges in federal courts only in treason and capital cases, 1 Stat. 119; see *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803, 808 n. 1 (1990).[24]

The Reconstruction Congress in 1872 passed legislation which for the first time specifically provided peremptory challenges in federal civil cases.[25] This Act

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[24] Much of the argument in this section borrows, sometimes verbatim, parts of the "Brief Amicus Curiae in support of Petitioner filed by the NAACP Legal Defense and Educational Fund, Inc., the Lawyers' Committee for Civil Rights Under Law, and the American Jewish Committee," at 14. Attribution will be given only at the end of appropriate paragraphs. Amicus Br. at 14-15.

[25] 17 Stat. 282. In 1840 Congress authorized the federal courts to adopt local rules regarding jury selection based on state practice. 5 Stat. 394. This legislation was interpreted to authorize the adoption of local rules regarding peremptory challenges. *United States v. Shackleford*, 18 How. (59 U.S.) 588 (1856).

was part of Congress's attempt to increase the fairness of judicial proceedings. As the bill's sponsor, Representative Butler, explained:

> In civil cases in cities, where frequently we get a merchant on the jury, he may be as much interested as the man whose case is being tried, and it is necessary to get him off the jury. We therefore amend the law by entitling each party in such cases to three peremptory challenges.[26]

Coming only four years after the ratification of the Fourteenth Amendment and following closely after the Civil Rights Acts of 1866 and 1871, the Congress was certainly conscious of ensuring equal justice for all. In civil as well as criminal cases, the Congress was saying, **"What we aim at here is to get a fair jury."** Cong. Globe 42d Cong., 2d Sess., 3412 (1872) (Representative Butler, emphasis added).[27]

As this Court observed last term, "[o]ne could plausibly argue (though we have said the contrary, see *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919)), that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges, . . . " *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803, 808 (1990). The respondent does **not** contend that peremptory challenges in civil cases are constitutionally required for a fair and impartial jury. But it seems clear that, as a matter of legislative policy, the Reconstruction Congress adopted peremptories in federal civil trials as a means of achieving fair and impartial jury trials.

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[26] Cong. Globe, 42d Cong., 2d Sess., 3411 (1872) (Rep. Butler).

[27] Amicus Br. at 15, 19, and 21.

2) Congress Has Treated Peremptories in Civil and Criminal Cases Differently.

Besides historical development, peremptories in civil cases differ from criminal cases in other important respects. Although the 1872 Act providing for civil trial peremptories also included peremptories in criminal cases, 17 Stat. 282 (1972), important differences in legislative policy between criminal and civil trials are reflected in the number and allocation of peremptories. In criminal cases then and now, Congress has given the defendant more (originally many more) peremptories than it has given to the government. In civil cases then and now, each party has been given three peremptories. The record shows Congress was concerned in 1872 to counter the weight of prosecutorial power.

> 'We give the defendant more because the defendant is sometimes oppressed by the whole powers of the government; sometimes he has the whole government down upon him."
>
> Cong. Globe, 42d Cong., 2d sess., 3412 (1872).

Although the prosecution is entitled to a fair trial, only the criminal defendant has the right to a jury trial under the Sixth Amendment.[28]

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[28] Rule 23 of the Federal Rules of Criminal Procedure conditions defendant's right to waive a jury trial on agreement by the prosecution. This provision has been upheld on the basis that a criminal defendant has no right as such to a nonjury trial. *Singer v. United States*, 380 U.S. 24 (1965). The fact, however, that a rule in effect allows the government to have a jury when the defendant would waive the jury does not mean the prosecution has a constitutional right to jury trial.

While such disparities between the prosecution and the criminal defendant on peremptories need not exist, they are constitutionally permissible as a matter of legislative policy. No such inequalities in peremptories do or should exist between plaintiffs and defendants in federal civil cases. Both parties have a Seventh Amendment Right of Jury Trial. Even though the Seventh Amendment has not been made applicable to the states, neither should disparities on peremptories in state civil trials exist because presumably affording a greater number of peremptories to either plaintiff or defendant in civil cases, whether in a state or federal court, would violate equal protection.[29]

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[29] For purposes of equal protection, civil and criminal cases have been treated differently in other contexts by this Court. Few Supreme Court criminal cases have relied on the equal protection clause because of the availability of the due process clause of the Fourteenth Amendment and the specific guarantees of the Bill of Rights. The most significant cases are those holding that the equal protection clause requires government to provide an indigent with counsel for a first appeal of right, *Douglas v. California*, 372 U.S. 353 (1963) and *Ross v. Moffitt*, 417 U.S. 600 (1974), and also to waive filing and transcript fees for an indigent. *Griffin v. Illinois*, 351 U.S. 12 (1956). Indigent litigants in noncriminal cases certainly do not enjoy these same protections. *United States v. Kras*, 409 U.S. 434 (1973), holds that the equal protection clause does not require waiver of the filing fee in a bankruptcy proceeding, distinguishing *Boddie v. Conn*, 401 U.S. 371 (1971), which had held the Fourteenth Amendment's due process clause requires waiver of fees for an indigent seeking a divorce. Also *Ortwein v. Schwab*, 410 U.S. 656 (1973), upholds state filing fees for appellate court review of an agency's reduction in welfare payments.

Even where the number of peremptories for the prosecution and the defendant are equal, criminal cases generally allow for more peremptories than civil cases. The federal system permits up to twenty peremptories per side in criminal cases. A large number of peremptories, "makes the jury more homogeneous than the population at large – because each side is eliminating the persons who are suspected of holding extreme positions on other side – and to that extent the jury becomes less representative." J. M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* (1977) at 168 (hereinafter, "Van Dyke"). That Congress and generally the states allow more peremptories in criminal trials seems to reflect a greater concern for "extreme positions" of potential jurors in criminal cases. This concern along with the distinguishing features of a criminal case, i.e., the power of the state and the judgment of the community, certainly offers a rational basis for treating criminal cases differently.

On the other hand, a large number of challenges in criminal cases means potentially more distortion in the racial composition of the jury. See Van Dyke at 169. That factor together with the long-standing jury-selection practices of prosecutors, see *Batson*, 476 U.S. at 99, suggests a greater likelihood of discrimination in criminal cases. Yet even though randomness in the petit jury would eliminate this distortion in the racial composition, it has not been constitutionally required in criminal cases, *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986),[30] nor even

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[30] See discussion *supra* in text accompanying n. 11.

deemed desirable because it "would cripple the device of peremptory challenges." *Holland v. Illinois*, 110 S.Ct. at 809 (1990).

By providing peremptory challenges, Congress allows the litigants to distort the near-randomness that otherwise would exist in the petit jury. Under the Jury Selection and Service Act of 1968, the pool of jurors in federal court from which the grand and petit jury selections are made, aims at randomness. 28 U.S.C. § 1861. The Act's purpose is to secure a fair and impartial jury – which is assumed will result from randomness.[31] Of course, the random selection process applied in a community generally biased against a criminal defendant would not produce a fair and impartial jury. The solution in such a criminal case would be a change of venue.[32] Thus, the jury selection process sometimes involves a tension

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[31] Prior to the Jury Selection and Service Act of 1968, as explained in an article by Judge Gewin, "The Jury Selection and Service Act of 1968," 20 *Mercer L.Rev.* 349, the "key man" system was the "most widely employed method of selecting jurors" in federal court. *Id.* at 354. This system permitted jury commissioners a great deal of discretion and was not at all random. *Id.* Statistical studies demonstrated that necessarily the key-man system resulted in great disparities between the eligible population and jurors chosen. *Id.* Nevertheless, "[t]he satisfactory performance of key-man juries caused the Judicial Conference to endorse the system for a number of years in spite of its inherent deficiencies." *Id.* at 35. It was not until 1966 that the Judicial Conference "endorsed the principle of random selection of jurors in a manner that would produce a fair cross section of the community . . . " Kaufman Report, 42 F.R.D. at 358, quoted by Gewin at 357.

[32] The criminal procedural provision reflects concerns of fundamental fairness different from the concerns of convenience involved in a change of venue in civil cases under the doctrine of forum nonconveniens. *See* 28 U.S.C. § 1404(a).

between randomness and fairness. Under the Jury Selection and Service Act of 1968, the goal in the petit jury, contrary to the assumption of one of the amicus briefs,[33] is not randomness, but a fair and impartial jury. Randomness in the general pool and challenges to the particular panel are merely means to the same end, an impartial jury. See *Holland v. Illinois*, 110 S.Ct. at 807 ("the Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury which the Constitution does not command), but an *impartial* one (which it does)." (emphasis in original).

C. Extension of *Batson* Undermines Congress's Purpose in Providing Peremptories in Civil Cases.

An important purpose of peremptory challenges is to permit a party to remove potential jurors believed to be, but not shown in fact to be, biased. A party "may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted." *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). As the legislative history of section 1870 – previously quoted[34] – reveals, Congress sought to provide litigants with a safeguard against biased jurors. Resort to peremptory challenge may also be necessary where a juror may have taken offense because a party had

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[33] Amicus Br. at 31.

[34] See text following n. 25.

sought, without success, to remove that juror for cause. *Swain v. Alabama*, 380 U.S. 202, 219-20 (1965).[35]

From these observations, amici for the petitioner conclude that the application of *Batson* is necessary to effect the intent of Congress.[36] However well-intentioned their policy conclusions, what amici advocate could just as well undermine the goals they hope to achieve. For example, suppose the trial attorney for a black litigant who believes a white (or Hispanic or Oriental, etc.) potential juror is racially biased questions that person in an attempt to establish a challenge for cause.[37] If the challenge for cause is denied, the litigant must – as a practical matter – challenge the juror peremptorily. If *Batson* is applicable, the opposing party is likely to allege racial motivation in the challenge. Based upon the prior questioning, the opponent has a basis for claiming a prima facie case. If so, the attorney for the black defendant would have to offer a "race neutral" reason. While trying to eliminate racial bias from the jury panel, the attorney's motivations have not been "race neutral." If the attorney is forced to explain his challenge and does so truthfully, the court would have to say it was not race neutral. The court might decide that, although not race neutral, the

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[35] Amicus Br. at 16-17.

[36] *Ibid.* at 17.

[37] Whether or not the lawyers can question the prospective jurors is a matter for the trial judge to determine. Fed. R. Civ. Proc. 47(a). By local rule in many districts, the federal judge does the questioning. In many states, however, attorneys are allowed to question the jury venire. Unless this case is decided on purely statutory grounds, the result will apply equally well in those state courts.

exercise of the peremptory was nevertheless justified. If justified (although "cause" has not been shown), what is to prevent other attorneys from targeting jurors of a race different from their clients' and engaging in questions they will later claim were designed to eliminate the juror for cause due to racial bias? If this result is allowed to come about, as it certainly will if *Batson* is extended to civil cases, this Court will have completely subverted the antidiscriminatory purposes which prompted Congress to create civil trial peremptories in the first place.

In response, the appellant might argue that *Batson* would no more undermine civil trial peremptories than it does criminal trial peremptories. First of all, however, *Batson* affects at this point only the exercise of peremptories by the prosecution. As to the prosecutor, the possible limitation on the usefulness of the peremptory is unique because the government does not have a right to jury trial and does not suffer from racial, ethnic, or religious discrimination as does an individual criminal defendant or private party litigant. The government is entitled to a fair trial, but historically that has been deemed satisfied even when the criminal defendant had peremptories and the government had none.

If applied to civil trials, each party necessarily would be able to raise the *Batson* issue. As previously indicated, the judge would then be required to inquire of and make decisions on a series of charges and counter charges. In such a situation, "there is every reason to believe that many commonly exercised bases for peremptory challenge would be rendered unavailable." *Holland v. Illinois*, 110 S.Ct. at 810 (1990). As a practical matter, judges would severely limit and legislatures would probably

eliminate peremptories. Petit juries then would reflect, as federal jury pools now do, the cross-section of the community standard.

Charting such a course would lead by indirection to a result rejected last term in *Holland*. Thus in essence, petitioner sails under a jury-rigged argument combining a Seventh Amendment rationale with *Batson's* more limited equal protection holding in a criminal context. No combination of constitutional provisions, cum penumbras, will bear the weight of that argument.

CONCLUSION

For the foregoing reasons, Respondent, **Leesville Concrete Company, Inc.**, respectfully urges that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed in all respects.

Respectfully submitted,

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No. 89-7743

In The

Supreme Court of the United States

October Term, 1990

THADDEUS DONALD EDMONDSON,

Petitioner,

v.

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONER

I. INTRODUCTION

This case presents three somewhat interrelated issues: (1) whether the constitutional rule in *Batson v. Kentucky*, 476 U.S. 79 (1986), applies to civil cases[1]; (2) whether federal statutes authorize the use of race-based peremptory challenges in federal civil cases, and (3) whether this Court in the exercise of its supervisory power should forbid the use of race-based peremptory challenges in federal civil cases.[2]

Because the brief for respondent deals primarily with the constitutional issue, this reply brief does so as well. In so doing we continue to maintain the statute at issue (28 U.S.C. 1870) does not authorize race-based peremptory challenges in civil cases. But, as the detailed analysis of the statutory issues set forth by an amicus[3] provide other equally compelling support for petitioner's position, we urge the Court to follow its well-established prudential practice and to reverse the decision below on the non-constitutional grounds.

Respondent suggests the trial court below found that the disputed peremptory challenges were not racially motivated. (R.Br. 3, 11, 89). Were this in fact the case, had

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[1] In addition to the briefs of the parties, this issue is discussed at length in the Brief Amicus Curiae of the American Civil Liberties Union.

[2] In addition to the briefs of the parties, the second two issues are discussed at length in the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc.

[3] *Id.*

the judge conducted the inquiry required by *Batson* then held that the jurors had been excused for a neutral, nonracial reason, the legal issues briefed by the parties would be moot. But the district judge expressly refused to conduct such an inquiry and never required or obtained from counsel for respondent "a neutral explanation for challenging black jurors" required by *Batson*, 476 U.S. at 97. The remarks of the trial judge on which respondent relies read:

> The court finds there is no discrimination, no violation of the law in the selection process. *And the motion to have the defendant articulate the reasons why he challenged the two black jurors is denied.*

(J.A. 52-53.) (Emphasis added) The finding of "no discrimination," as the rest of the sentence makes clear, is a finding of no *unlawful* discrimination since the trial judge believed respondent could legally use its peremptories to exclude jurors on the basis of race (J.A. 52-53). In any event the district judge, in declining even to ask counsel for respondent to explain the challenged peremptories, did not conform to the procedure mandated by *Batson*.

Respondent suggests the issue raised by this case "is an important one to every attorney who litigates civil cases in federal and state courts." (R.Br. 4). Actually, the effects of this Court's ruling are likely to be less widely felt. The issue will affect only civil cases in which one of the litigants is non-white. In a nation in which blacks remain disproportionately poor, they are only infrequently parties to cases which make up the gulf of jury trials in the U. S. District Court, such as commercial, copyright infringement, etc. With the exception of the

instant case and the Seventh Circuits recent decision in *Dunham v. Frank's Nursery & Crafts, Inc.*, 1990 WL 198907 (7th Cir. 1990) all federal civil cases in which *Batson* issues have arisen have in fact been civil rights claims.[4]

II. THE CONSTITUTIONAL RULE IN *BATSON V. KENTUCKY*, 476 U.S. 79 (1986), SHOULD BE APPLIED TO CIVIL CASES

Five years ago this court held in *Batson v. Kentucky* that "[i]n view of the heterogeneous population of our Nation, public respect for . . . the rule of the law will be strengthened if we ensure that *no* citizen is disqualified from jury service because of his race." 476 U.S. at 99. (Emphasis added). *Batson* was based on more than a century of decisions by this Court which "made clear that the Constitution prohibits *all forms* of purposeful racial discrimination in selection of jurors." 476 U.S. at 88. (Emphasis added) The constitutional question presented by this case is whether the Court will now hold that the Constitution actually permits some forms of purposeful racial discrimination in jury selection, and will rule as did the court below, that a black citizen may indeed be disqualified because of his or her race from service on a civil jury.

Nothing in *Batson* itself suggested there was to be an exception, in civil cases or any other type of proceeding, to the general principles announced by the Court. On the

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[4] Dunham v. Frank's Nursery & Crafts, Inc., 1990 WL 198907 (7th Cir. 1990). Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., pp. 22-23 n. 17.

contrary, much of the reasoning of *Batson* was and is fully applicable to the utilization of race-based peremptory challenges in civil cases. *Batson* and its progeny emphasized that the use of race-based peremptories to "purposefully exclude black persons from juries [would] undermine public confidence in the fairness of our system of justice." 476 U.S. at 87; see *Holland v. Illinois*, 107 L.Ed.2d 905, 922 (1990); *Allen v. Hardy*, 478 U.S. 255, 259 (1986). Such discrimination, *Batson* reasoned, would act as a "stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." 476 U.S. at 88. Public confidence in the fairness of civil litigation, and the need to eliminate any potential source of prejudice against civil litigants of a particular race are assuredly as important as in criminal cases.

The court below held *Batson* was inapplicable to civil cases because it believed the racially-motivated exclusion of black jurors in such cases did not involve state action. The actual exclusion of black jurors in civil cases, in one respect, is undeniably state action. Neither federal nor state law permits an attorney to order a prospective juror to leave the jury box. Only a judge can issue such a directive. Where a judge, in response to the proposed exercise of a race-based peremptory challenge, directs a black juror to leave, the judge's order is obviously state action. The Fifth Circuit did not, of course, suggest otherwise. It reasoned that no constitutional violation occurred because, although the order itself was state action, the racial motive that gave rise to that order was attributable solely to the private lawyer representing a civil litigant.

Here, the Fifth Circuit departed from clear precedents of this Court.

This Court has repeatedly rejected suggestions that it treat as separate and distinct the government action which injured a black complainant, and the racial motives of private individuals who instigated it. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the court held that a state judge could not enforce at the behest of private parties a privately agreed upon racially restrictive covenant. In the Girard College case, *Pennsylvania v. Board of City Trusts*, 353 U.S. 230 (1957) the Court ruled that a state board could not implement the racially restrictive terms of a will creating a school limited to whites. On two occasions the Court has insisted a state could not carry out the provisions of a political party rule permitting only whites to vote in party primaries. *Terry v. Adams*, 345 U.S. 461 (1944); *Smith v. Texas*, 311 U.S. 128 (1940).

If the parties to a civil case entered into a written agreement that only whites would sit on the jury to hear their case, no federal or state judge could constitutionally implement it. A *fortiori*, a judge cannot do so where the exclusion of non-whites is sought by only one party, over the objection of the other, or where the attorney seeking that exclusion may attempt, without success, to mislead the judge as to his factual motive.

The result is no different if, as the Fifth Circuit suggested, the issue is recast as a question regarding whether the actions of the lawyer exercising the race-based peremptories are themselves state action. Under *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), the question of

whether such an attorney's conduct may be fairly attributed to the state turns on two circumstances. First, the deprivation complained of "must be caused by the exercise of some right or privilege created by the State." 457 U.S. at 937. This first requirement is easily satisfied in the instant case; the peremptory challenge accorded to respondent, if federal law authorizes race-based peremptory challenges,[5] is a privilege created by federal statute. In the absence of that statute, 28 U.S.C. § 1870, counsel for respondent could not have obtained the removal of the prospective jurors at issue.

The second requirement set forth in *Lugar* is that

> the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise fairly chargeable to the State.

457 U.S. at 937. This requirement, too, is satisfied; counsel for respondent, in his attempt to remove the two jurors at issue, undeniably received significant, indeed essential, aid from the federal judge.

The power exercised by counsel for respondent in the district court procedure was inherently governmental because that attorney was, as a practical matter, exercising authority to hire or dismiss a federal official. If in the instant case, the district judge had advised the litigants

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[5] As we noted earlier, petitioner contends that federal law does not in fact authorize the use of race-based peremptory challenges.

he would fire any law clerk to whom they objected, and respondent had then asked the judge to dismiss a law clerk because he or she was black, the resulting dismissal would unquestionably have been unconstitutional government action. The same would be true if the district judge, at the behest of a racially-motivated litigant, had fired a black marshal, bailiff, or court reporter. The selection or removal of a government employee is an inherently governmental responsibility, regardless of whether the person exercising that power is himself on the government payroll.

Federal and state jurors while in that position are "public servants charged with important responsibilities." Edmonson en banc at p. 233, Rubin dissent. Federal jurors, along with members of Congress and of this Court, are among the small number of federal officials specifically referred to in the United States Constitution. Jurors are protected from threats and retaliation by the same provision of federal law that shields "officers in or of any court of the United States." 18 U.S.C. § 1503. And federal jurors are paid, albeit modestly, for their work. 28 U.S.C. § 1861. If it would be state action for counsel in a civil case to exercise control over the hiring and firing of ordinary court officials, the result is presumptively the same when that power is exercised over the selection of jurors.

In the instant case counsel for respondent utilized peremptory challenges to remove two black prospective jurors, Willie Combs and Wilton Simmons. Suppose Combs and Simmons had sued for the daily salary paid to federal jurors under 28 U.S.C. § 1861, and were able to prove that counsel for respondent had had them excused

solely because they were black. Such a showing would undeniably establish a compensable constitutional violation. If the racial motivation alleged by petitioner would be sufficient to establish a constitutional violation in an action by Combs and Simmons for lost compensation, surely that same allegation, if proven, would also be a constitutional violation in the instant action.

The en banc majority regarded the federal judge in this case as no more than a passive and powerless bystander. The exercise of race-based peremptories, the circuit court suggested, was a wholly private act of racial discrimination which, coincidentally, happened to occur in a United States Courthouse when a federal judge chanced to be in the room. This characterization ignores the pivotal responsibility of a district judge for the administration of justice in federal court. Moreover, the constitutional prohibition against racial discrimination has unique force and meaning where the discrimination touches the judicial process. The legislative history of the Fourteenth Amendment reflects an extraordinary preoccupation with the affirmative responsibility of the states to establish and safeguard a judicial process to which the newly freed slaves could resort for effective, fair and nondiscriminatory protection of their lives, liberty, and property.[6] Even if some degree of acquiescence in privately instigated discrimination might be constitutionally tolerable in other aspects of governmental affairs, such acquiescence is uniquely unconstitutional when it affects the

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[6] That history is set forth in detail in the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., and the American Jewish Congress, in South Carolina v. Gathers, ___ L.Ed.2d ___ (1989), No. 88-305.

judicial process. The principles which lie at the very core of the Equal Protection clause and account for the use of the word "protection" in that guarantee, are equally applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The scope of the state action requirement in the Fourteenth and Fifth Amendments must to some degree be read in light of the historical circumstances that prevailed when those provisions were adopted. The instant case involves as well in part the interplay between the Fifth Amendment prohibition against discrimination and the Sixth and Seventh Amendment rights to jury trial. In construing the Sixth and Seventh Amendments, this Court has paid particular heed to their historical backgrounds.

Peremptory challenges for criminal defendants, especially in capital cases, may be distinguishable from peremptory challenges in civil cases. Peremptory challenges for criminal defendants predated the Constitution by several hundred years, and were well recognized when the Fifth, Sixth, Seventh and Fourteenth Amendments were adopted. *See Swain v. Alabama*, 380 U.S. 202, 212-14 (1965). On the other hand, the legislative history of the Fourteenth Amendment suggests special problems may be presented where a state permits peremptory challenges to be utilized by defense counsel to obtain an all-white jury that would refuse to punish crimes committed against a black victim. For these reasons, as in *Batson* itself, it would appear prudent to defer any decision regarding the exercise of peremptory challenges by defense counsel in criminal cases. *See Batson*, 476 U.S. at 89 n.12.

But the application of *Batson* to civil cases present no such difficulties. As respondent correctly observes, peremptory challenges in civil cases were virtually unknown in the eighteenth century, and were not expressly provided for in federal cases until six years after Congress had approved the Fourteenth Amendment. (R.Br. 41) There is thus no historical basis for treating peremptory challenges in civil cases differently than any other form of state action.

III. THE STANDARD PROPOSED BY RESPONDENT WOULD BE UNWORKABLY COMPLEX

Certiorari was granted in this case to decide whether race-based peremptory challenges should be permitted in civil cases. Petitioner urges the Court to apply to all civil cases the same rule formulated in *Batson v. Kentucky*. The position advocated by respondent is considerably more complex. Respondent insists that the use of race-based peremptory challenges in *this* case is permissible, but acknowledges that in a variety of other civil cases such challenges would not or might not be constitutional.

(1) The dissenting opinion below relied heavily on *Shelley v. Kraemer*, 334 U.S. 1 (1948), and on the Girard College Case, *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957). Judge Rubin argued that if a judge cannot enforce a race-based restrictive covenant, a judge cannot enforce a race-based peremptory challenge. Respondent insists that the instant case differs from *Shelley* because counsel for respondent below never expressly acknowledged to the judge that any challenge was racially motivated:

> In . . . *Shelley* . . . the state entity purposefully participated in discrimination . . . No one has suggested that the trial judge in this case, or federal district judges generally, *knowingly* participated in discrimination . . . The importance of the mental element of purposeful participation in *known* discrimination for determining the threshold issue of state action is what marks *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957) . . . In *Board of Trusts* a [state board] . . . administered a trust and school established by the will of Stephen Gerard for "poor white male orphans." . . . The state appointed the Board and administered the trust and school with full *knowledge of the discriminatory purpose of the trust. That knowing participation* in the discriminatory action was the critical element . . .

(R.Br. 11-12) (Emphases added and omitted)

We agree that had counsel for respondent announced at trial and he was utilizing his peremptory challenges for the purpose of removing black jurors, the trial judge, by *knowingly* excluding minority jurors as challenged, would undoubtedly have violated the Fifth Amendment. Neither the state nor federal judges can knowingly make "available to such [counsel] the full coercive power of government to deny to petitioner[s], on the grounds of race of color," the right to trial by a jury from which members of his race have been deliberately excluded. *Shelley v. Kraemer*, 334 U.S. at 19. In this case, as in *Batson*, the lawyer exercising the disputed peremptories did not spontaneously admit to an invidious motive. If, however, the inquiry contemplated by *Batson* had occurred, and the court had discovered and found that counsel for respondent had acted for racial reasons, then the trial judge

would have been forbidden – on respondent's own view – from excluding the challenged jurors.

The central issue is whether the trial judge should have conducted such an inquiry. If, as respondent seems to agree, judicial knowledge of an invidious motive would preclude removal of the challenged jurors, a judge cannot deliberately avoid steps that might bring such knowledge to his attention. If judicial recognition of the motives of an objecting party would be dispositive, it would be as wrong for the judge to refuse to hold a *Batson* hearing as it would be for the judge, like Ulysses' crew, to plug his ears with wax in order to avoid hearing a litigant's confession of racial motive. Compare *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973).

In Respondent's view, it would be constitutionally irrelevant that black jurors were in fact being deliberately purged by peremptory challenge so long as the covert but invidious scheme was not patently obvious to a passive and credulous observer. Respondent suggests that the Fifth and Fourteenth Amendments require not that jurors in fact be selected without regard to race, but only that any statements volunteered by the attorney involved not inadvertently disclose what is actually going on. If there is any precedent for such an elevation of appearance over reality, it is not *Shelley* or the Girard College Case, but Milli Vanilli.

(2) Respondent repeatedly emphasizes that it is not suggesting *Batson* would be inapplicable to the use of peremptory challenges by a governmental litigant in a civil case. On the contrary, respondent's argument is

premised on its insistence that the instant case involves a private litigant[7] represented by a private attorney.[8]

Batson is by its very terms applicable to the exercise of peremptory challenges by the government in any case. The reasoning and holding of that decision clearly did not turn on the fact that *Batson* was a criminal rather than a civil case. On the contrary, this Court emphasized in *Holland v. Illinois*, 107 L.Ed.2d 905 (1990), that *Batson* had been decided under the Fourteenth Amendment – which applies with equal force to forbid discrimination in civil, criminal, or any other state proceeding – and not under the Sixth Amendment, which concerns only criminal cases. *Batson* merely applied to the exclusion of jurors by means of peremptory challenge the long-standing principle that "[e]xclusion of black citizens as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure" 90 L.Ed.2d at 80. A state could not enforce a statute forbidding blacks to sit as jurors in a civil case to which the state was a party. *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880). A state is equally forbidden to achieve that goal through discrimination by "its administrative officer" or at "other stages in the selection process." *Batson*, 90 L.Ed.2d at 82.

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[7] R.Br. i ("nongovernmental litigant"), 4 ("nongovermental party"), 6 ("nongovernmental parties"), 8 ("nongovermental litigants"), 9 ("private parties"), 10 ("nongovernmental party"), 14 ("private litigants"), 21 ("nongovernmental parties").

[8] R.Br. 4 ("private attorneys"), 19 "(private counse[l]"), 20 ("nongovernmental attorneys").

But maintaining in civil case a distinction between governmental and nongovernmental litigants would be difficult, and this exception alone might well apply to a large proportion of all cases in which *Batson* issues arise. The exception would certainly include a section 1983 or other claim against a city or county, or against a governmental official in his or her official capacity. *See Brandon v. Holt*, 469 U.S. 464 (1985). This exception would probably encompass as well suits against officials or former officials in their personal capacities, and at least some suits against private parties represented by government, or government paid, attorneys. In the instant case the defendant is a private corporation, but federal jurisdiction exists solely because the cause of action arose on a federal facility at which the defendants acting on behalf of, and under contract to, the federal government. Were this Court to hold that the applicability of *Batson* to civil cases turns on the nature of any government ties of the parties, it would be necessary to remand this case to evaluate the degree of governmental connection to the incident giving rise to the claim at issue. Given the substantial state action in these cases deriving from the role of the trial judge in actually excluding the challenged jurors, even a modest degree of government connection to the objecting party would easily tip the scales, if such additional state involvement is indeed needed, to a finding of unconstitutional state action.

(3) Respondent expressly declines to address whether "Batson applies to parties in civil rights litigation," recognizing "that arguments can be made to distinguish their situation from that of a normal private litigant." (R.B. 6). The applicability of *Batson* to civil

rights cases is of considerable practical importance, since most of the federal civil cases in which *Batson* issues have arisen are in fact civil rights cases brought under the Civil Rights Acts of 1866 and 1987.[9]

Even if *Batson* does not apply in ordinary civil cases it certainly ought to apply in civil rights cases. This Court has expressly insisted that special steps be taken to guard against a racially tainted jury where "[r]acial issues . . . [are] inextricably bound up with the conduct of the trial". Compare *Ristaino v. Ross*, 424 U.S. 589, 597 (1976) with *Ham v. South Carolina*, 409 U.S. 524 (1973). Civil rights cases ordinarily involve enforcement of the Fourteenth Amendment, the Fifth Amendment, or of statutes which implement the principles of those Amendments. It would be strange indeed if the constitutional guarantees against discrimination themselves sanctioned discrimination in the very judicial proceedings initiated to end discrimination itself.

(4) Respondent apparently recognizing that race-based peremptory challenges could skew the jury selection process, suggests that "affording a greater number of peremptories to either plaintiff or defendant in civil cases, whether in a state or federal court, would violate equal protection." (R.Br. 44). But providing all parties an equal number of peremptories frequently will be insufficient to put the parties on a fair and equal footing.

In a jurisdiction in which similar numbers of blacks and whites are on the jury venire, giving the parties equal

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[9] Brief Amicus Curiae of NAACP Legal Defense and Educational Fund, Inc., pp. 22-23 n.17.

numbers of peremptories would afford to all sides a comparable opportunity to shape the racial composition of the jury. However, in the vast majority of state and federal courts blacks constitute only a minority, often a small minority, of the venire. Thus in the typical jury selection process a white litigant will be able to use his or her peremptory challenges to eliminate all blacks from the jury, while the black litigant quickly exhausts his or her challenges without being able to overcome the effect of that racial purge. In all but a handful of federal district courts there are ordinarily only one or two blacks on a typical jury panel; if white litigants are determined to use their three challenges to obtain an all white jury, black litigants, despite having an equal number of challenges, would be powerless to prevent that result. Under these circumstances a black litigant would be entitled to claim that even a nominally equal number of challenges put him or her at an intolerably unfair disadvantage.

Were this Court to hold that *Batson* does not apply to all civil cases, there would undeniably be a number of different types of civil cases in which *Batson* nonetheless would be controlling. We urge that those exceptions would be sufficiently numerous and broad as to largely eviscerate the underlying rule proposed by respondent. At the least, litigation about the scope of such exceptions will be complex, time consuming, and in all likelihood, interminable.

CONCLUSION

For the above reasons, the en banc decision of the court of appeals should be reversed.

Respectfully submitted

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No. 89-7743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THADDEUS DONALD EDMONDSON,

Petitioner,

v.

LEESVILLE CONCRETE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND AMERICAN JEWISH COMMITTEE

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1870 require or authorize a federal judge to exclude a black prospective juror in a civil case where a party seeks to exclude that juror by means of a peremptory challenge because of his or her race?

2. Do 28 U.S.C. § 1862 or 42 U.S.C. § 1981 forbid a federal judge from excluding a black prospective juror in a civil case where a party seeks to exclude that juror by means of a peremptory challenge because of his or her race?

3. Where a civil jury has been assembled by means of race-based peremptory challenges, does a federal court have inherent authority to dismiss that jury?

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INTEREST OF AMICI[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist blacks to secure their constitutional and civil rights by means of litigation. The Fund's attorneys represent the plaintiffs in a number of federal civil rights cases which have been or will be tried before civil juries. E.g. *City of Little Rock v. Reynolds*, No. 90-1.

The Lawyers' Committee for Civil Rights Under Law is a nationwide civil rights organization founded in 1963 by members of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights.

The American Jewish Committee is a national membership organization, founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC has always believed that these rights can be secure for Jews only

[1]The parties have consented to the filing of this amicus brief.

if they are equally secure for Americans of all faiths, races and ethnic backgrounds. AJC, therefore, has been actively involved in the civil rights cause since its inception. The organization has always urged that civil rights laws be interpreted broadly to effectuate their purposes. AJC believes that the exclusion of African Americans from juries in civil cases through the use of peremptory challenges is a grievous deprivation based on race which is in violation of existing law.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in Appendix A.

SUMMARY OF ARGUMENT

The courts below should not have passed on the constitutionality of excluding a jury or because of a race-based peremptory challenge without first deciding whether federal law authorizes or requires the removal of such jurors. Section 1870, 28 U.S.C., which establishes peremptory challenges in civil cases, should be interpreted in a manner that avoids this constitutional problem.

The essence of the peremptory challenge authorized by section 1870 is a challenge which does not require proof that the juror in question should be removed for cause. But that is a far cry from authorizing litigants to introduce racial considerations into the jury selection process. The purpose of peremptory challenges is to enable a party to exclude a prospective juror who it believes may be biased. But "[a]

person's race simply is 'unrelated to his fitness as a juror'". *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). For that reason *Swain v. Alabama*, 380 U.S. 202, 224 (1965), recognized that the removal of a juror solely because of his or her race would be a "perverted" use of a peremptory challenge. Section 1870 should not be construed to authorize or require removal of a juror where the proposed peremptory challenge would frustrate rather than advance the creation of an impartial jury.

The general language of section 1870 must be construed in the light of the more specific provisions of federal laws prohibiting racial discrimination in jury selection. Section 1862, 28 U.S.C., expressly provides that "[n]o citizen shall be excluded from service as a ... juror on account of race." The word "excluded" is a term of art under the Jury Selection and Service Act of 1968; jurors removed from a panel because of a peremptory challenge are said to be "excluded". Section 1981 of 42 U.S.C. prohibits racial

discrimination in jury selection. *Strauder v. West Virginia*, 100 U.S. 303, 311-12 (1880). Section 1981 applies to private as well as government action. *Patterson v. McLean Credit Union*, 105 L.Ed.2d 132 (1989).

This Court has substantial supervisory power over the federal courts, and has utilized that authority to prohibit discriminatory jury selection practices. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (wage earners); *Ballard v. United States*, 329 U.S. 187 (1946) (women). The exercise of that authority is even more appropriate where the discrimination at issue is racial. The Court's supervisory power should be exercised in the circumstances of this case to protect the right of black prospective jurors to participate in the administration of justice. "The reality is that a juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation...." *Holland v. Illinois*, 107 L.Ed.2d 905, 922

(Kennedy, J., concurring). Federal judges should not be knowing accomplices to such discriminatory practices.

ARGUMENT

I. THIS COURT NEED NOT DECIDE THE CONSTITUTIONAL QUESTION ADDRESSED BY THE COURTS BELOW

The decisions of the courts below are largely devoted to a constitutional question -- whether *Batson v. Kentucky*, 476 U.S. 79 (1986), should be applied to civil cases. Had the instant case arisen in state courts, it could be resolved in this Court only by addressing that constitutional issue. In *Batson*, for example, the Kentucky courts had already held that the disputed exercise of peremptory challenges in that case was consistent with state law. See 476 U.S. at 84. The instant case, however, was filed and tried in federal court. Accordingly, this Court would have no need or occasion to reach any constitutional question until and unless it determines that *federal* law required or authorized the

district judge to take the actions whose constitutionality was challenged below.

It has been the consistent practice of this Court to decline to address a constitutional question where a case can be resolved on a non-constitutional basis. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972). It is, moreover, the settled policy of this Court "to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 104 L.Ed.2d 923, 932 (1989). In the instant case any legal authority for the exclusion of the black prospective jurors at issue can only derive from the federal statute establishing peremptory challenges in civil cases, 28 U.S.C. § 1870. If the disputed actions were authorized or required by section 1870 and those actions are indeed unconstitutional, then section 1870 would to that degree itself be unconstitutional.

Despite these two well established prudential rules, the en banc decision below considered only the constitutional issue, assuming without explanation or comment that federal law requires federal judges to implement, indeed protect the use of, race-based peremptory challenges in civil cases. The original panel decision in petitioner's favor, on the other hand, relied at least in part on a construction of section 1870.[2] A number of other lower court decisions regarding the use of race-based peremptory challenges in civil cases have specifically dealt with non-constitutional arguments regarding such challenges.[3] This Court noted in *Batson* the existence of conflicting lower federal court decisions regarding whether the issue determined in that case on a

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[2]*Edmondson v. Leesville Concrete Co.*, 860 F.2d 1308, 1312 (5th Cir. 1989).

[3]*Maloney v. Washington*, 690 F. Supp. 687, 690 (N.D.Ill. 1988) (28 U.S.C. § 1862); *Esposito v. Buonome*, 642 F. Supp. 760, 761 (D.Conn. 1986) (28 U.S.C. §§ 1861, 1862); *Clark v. City of Bridgeport*, 645 F. Supp. 890, 896 (28 U.S.C.§ 1862), 897 ("inherent supervisory power") (D.Conn. 1986); *Holley v. J. & S. Sweeping Co.*, 192 Cal. Rptr. 74, 77, 143 Cal. App. 3d 588 (1983) (relying on state statutes similar to 28 U.S.C. §§ 1861, 1862).

constitutional basis could, in a federal case, be resolved by reference to the inherent supervisory powers of the federal courts. 476 U.S. at 82 n. 1.

The non-constitutional issues raised by this case are fairly comprised in the questions presented by the petition.[4]

II. FEDERAL LAW NEITHER REQUIRES NOR PERMITS A FEDERAL JUDGE IN A CIVIL CASE TO EXCLUDE A BLACK PROSPECTIVE JUROR BECAUSE OF A RACE-BASED PEREMPTORY CHALLENGE

Petitioner first objected to the use of race-based peremptory challenges immediately after respondent had announced which jurors it wished the trial judge to exclude, but before the trial court had acted to remove from the jury box the two black venirepersons, Willie Combs and Wilton Simmons, to whom respondent objected.[5] The issue raised by this first objection is whether a trial judge is obligated or permitted by federal law to remove a black prospective juror

[4]Petition, pp. i (section 1870, "[]power to supervise"), 7 ("discretion" of trial judge), 8 (28 U.S.C. § 1861), 9 (28 U.S.C. § 1870).

[5]Tr. 52-54.

if a civil litigant seeks to exercise a race-based peremptory challenge.

In the present posture of this case we do not know whether respondent objected to Combs and Simmons solely because they were black, since the trial court declined to question counsel for respondent. In other cases, however, in response to such inquiries, defense attorneys have been quite brazen in proclaiming their desire to obtain an all-white jury:

> [I]f I had a choice between a white juror and a black juror, I'm going to take a white juror ... [W]hy should I put ... my defendants at the mercy of the people in my opinion who make the most civil rights claims.[6]

> Counsel for the defendant conceded that race was a *factor*.... Although he claimed there were other reasons, he did not articulate them.[7]

On the view of the en banc court, the obligations of the trial

[6]*Clark v. City of Bridgeport*, 645 F. Supp. 890, 894 (D.Conn. 1986).

[7]*Williams v. Coppola*, 41 Conn. Supp. 48, 549 A.2d 1092, 1094 (Super. 1986) (emphasis in original).

judge in this case would have been the same even if counsel for respondent had openly proclaimed that he was objecting to Combs and Simmons expressly and solely because they were black. The court of appeals insisted that a federal judge, faced with an avowedly race-based peremptory objection to a black juror, would be legally required to remove the black juror at issue, and would be powerless to correct the racially tainted process that followed. On this view a Ku Klux Klan leader sued for an alleged act of racial violence could as a practical matter insist, brazenly and with success, on trial by an all-white jury, and a present or retired member of this Court, trying a case by designation, would be obligated to assist in an avowedly racist jury selection process.

A. Such A Race-Based Exclusion Would Be Inconsistent With The Purpose of Section 1870

The authority of federal judges in civil cases to exclude jurors because of peremptory challenges derives from 28

U.S.C. § 1870. We contend that section 1870 should be construed in a manner consistent with the constitutional rule in *Batson*. Any prospective juror, regardless of race, may be excluded by peremptory challenge, and, so long as no invidious motive is involved, a party is not prohibited from using peremptory challenges to exclude jurors of the same race as the opposing party. Where, however, a party seeks to exercise a peremptory challenge against a venire person because of his or her race, section 1870 neither requires nor authorizes a federal judge to remove that prospective juror. Where a judge declines on this basis to remove a juror, the objecting party retains the right to exercise that challenge, but must do so on a non-racial basis.

The en banc panel did not explain why it believed federal law compels the removal of a black juror because of a race-based peremptory challenge, other than to assert that that is "what the rule requires", 895 F.2d at 222, and that the use of peremptory challenges in civil cases is a

"common law" practice of "great age." 895 F.2d at 223, 226. In fact, however, the origin and age of peremptory challenges in civil cases are entirely different than those of the challenges accorded criminal defendants.[8] The only form of peremptory challenge recognized under the common law was that provided to defendants in criminal cases; as a practical matter, even it was largely limited to defendants in capital cases. *Swain v. Alabama*, 380 U.S. 202, 211-13 & n. 9 (1965). Under the common law, no party in a civil case was accorded any peremptory challenges.[9]

Peremptory challenges in civil cases were virtually unknown in this country when the Constitution was adopted, and became widespread only toward the end of the

[8]The exercise of peremptory challenges by defendants in federal criminal cases may raise somewhat distinct issues which we do not undertake to address.

[9]J. Proffatt, *A Treatise on Trial by Jury*, §§ 155, 163 (1877); *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 331 Mass. 366, 119 N.E.2d 169, 172 (1954); *Sackett v. Ruder* 152 Mass. 397, 25 N.E. 736, 738 (1890); *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N.W. 53, 55 (1896).

nineteenth century.[10] Consistent with the common law and state practice, the Judiciary Act of 1790 authorized peremptory challenges in federal courts only in capital cases.[11] The use of peremptory challenges in federal civil cases derives from legislation first enacted by Congress in 1872.[12] The current provision regarding such challenges, 28 U.S.C. § 1870, provides in pertinent part: "In civil cases, each party shall be entitled to three peremptory challenges." Any obligation imposed on federal judges to remove a black juror because of a race-based peremptory challenge must derive, if at all, from section 1870.

By according to civil litigants "peremptory challenges," Congress undoubtedly meant to create a species of challenge

[10]Proffatt, *supra*, § 163.

[11]1 Stat. 119; see *Holland v. Illinois*, 107 L.Ed.2d 905, 917 n. 1 (1990).

[12]17 Stat. 282. In 1840 Congress authorized the federal courts to adopt local rules regarding jury selection based on state practice. 5 Stat. 394. This legislation was interpreted to authorize the adoption of local rules regarding peremptory challenges. *United States v. Shackleford*, 18 How. (59 U.S.) 588 (1856). None of the federal court rules which we have been able to find from this era contain any references to peremptory challenges.

different than a challenge for cause. The essence of a peremptory challenge is that the objecting party can obtain the removal of a juror "without showing any cause at all." *Lewis v. United States*, 146 U.S. 370, 376 (1892). But to provide that a party may obtain the removal of a prospective juror without demonstrating good cause is a far cry from providing that the party has an absolute right to remove the juror, even if its reason be one harmful to the administration of justice. The law often accords individuals the freedom to take action arbitrarily, or for no reason at all, and yet forbids the same action if taken for an invidious motive. Under Title VII, for example, a private employer is free to reject a job applicant out of whim or caprice, but is forbidden to do so on the basis of race or sex.

The central purpose of peremptory challenges is to permit a party to remove potential jurors who it believes, but cannot demonstrate, may in fact be biased. A party

> may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted.

Hayes v. Missouri, 120 U.S. 68, 70 (1887). The legislative history of section 1870 reveals that, in authorizing peremptory challenges in civil cases, Congress sought to provide litigants with a safeguard against biased jurors:

> In civil cases in cities, where frequently we get a merchant on the jury, he may be as much interested as the man whose case is being tried, and it is necessary to get him off the jury. We therefore amend the law by entitling each party in such cases to three peremptory challenges.[13]

Resort to a peremptory challenge may also be necessary where a juror may have taken offense because a party had sought, without success, to remove that juror for cause. *Swain v. Alabama*, 380 U.S. 202, 219-20 (1965).

In both *Swain* and *Batson*, however, this Court emphasized that removal of a prospective juror because of his or her race would be a "perverted" use of a peremptory

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[13]Cong. Globe, 42d Cong., 2d Sess., 3411 (1872) (Rep. Butler).

challenge. *Batson v. Kentucky*, 476 U. S. at 91; *Swain v. Alabama*, 380 U.S. at 224.[14] Such a perverse application of section 1870 would be entirely inconsistent with the intent of Congress to facilitate removal of possibly partial jurors:

> Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial.... A person's race simply is "unrelated to his fitness as a juror."

Batson, 476 U.S. at 87.[15]

The larger purpose of peremptory challenges, and of section 1870, is to assure that civil cases will be decided by juries "which in fact and in the opinion of the parties are

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[14]See also *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E. 2d 499, 515 n. 28 ("what is involved here is an apparent perversion of a system designed to preclude prejudice"), *cert. denied* 444 U.S. 881 (1979).

[15]In enacting the Civil Rights Act of 1875, which forbad racial discrimination in the selection of federal or state juries, Congress emphatically rejected objections that blacks as a race could not be trusted to fairly adjudicate the rights of whites. Cong. Globe, 42nd Cong. 2d sess., app. 218 (Rep. McHenry), app. 598-99 (Rep. Rice) (1972). These debates occurred within a month of passage of the peremptory challenge provision now codified in section 1870. It is inconceivable that Congress intended to authorize civil litigants to remove black jurors on the very racist premise that Congress spurned in passing the Civil Rights Act.

fair and impartial." *Swain v. Alabama*, 380 U.S. at 212; see also *id.* at 218, 222; *Batson v. Kentucky*, 476 U.S. at 91.

> Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides," ... thereby "assuring the selection of a qualified and unbiased jury."

Holland v. Illinois 107 L.Ed.2d 905, 919 (1990). When section 1870 was first enacted, Representative Butler explained, "What we aim at here is to get a fair jury."[16]

The exclusion of black prospective jurors by means of race-based peremptories, however, would impair the very impartiality which Congress intended peremptory challenges to enhance. Regardless of whether the person making the selections is a government agent or a private party, the exclusion of jurors on the basis of race

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[16]Cong. Globe 42d Cong., 2d sess., 3412 (1872).

> cast[s] doubt on the integrity of the whole judicial process. [It] create[s] the appearance of bias in the decision of individual cases, and [it] increase[s] the risk of actual bias as well.

Taylor v. Louisiana, 419 U.S. 522, 532 n. 12 (1975).

> As long as there are significant departures from the cross sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

Id. at 529 n. 7.

> [T]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.... It is in the nature of the practices ... that proof of actual harm, or lack of harm, is virtually impossible to adduce.

Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (Opinion of Justice Marshall). The state courts of Massachusetts, Connecticut, California, Florida and New York have all concluded from practical experience that the exercise of race-based peremptory challenges increases substantially the risk that the resulting jury will be biased against members

of the excluded race. We set forth excerpts from those state court opinions in Appendix B.

It is particularly unlikely that in 1872, only four years after the ratification of the Fourteenth Amendment, Congress could have intended by enacting section 1870 to require federal judges to accede to the desire of civil litigants to purge blacks systematically from federal juries. By adopting the Civil Rights Acts of 1866 and 1871, Congress had conferred upon the federal courts primary responsibility for redressing violations of the rights of the newly freed slaves. Congress could have been under no illusion about how an all-white federal jury in any of the former confederate states would likely dispose of the civil rights claims of a black plaintiff.

> [I]t required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would ... be looked upon with jealousy and positive dislike.... "The right of trial by jury" ... is ... guarded by statutory enactments intended to make impossible ... "packing juries." It is well known that prejudices often exist against particular classes in the

> community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.... The framers of the [Fourteenth] Amendment must have known full well the existence of such prejudice.

Strauder v. West Virginia, 100 U.S. 303, 306-09 (1880). It is difficult to believe that the Reconstruction era Congress, having largely rewritten the federal Constitution and enacted revolutionary legislation in order to afford badly needed protection to the freedmen, could have intended section 1870 to license a scheme of race-based peremptory challenges that would have subverted all the legislative efforts of previous years. That danger is far from past; with the exception of the instant case, it appears that *all* of the reported federal civil cases in which parties have sought to purge black jurors involved claims under either the Civil Rights Act of 1866 or the Civil Rights Act of 1871.[17]

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[17]*Clark v. City of Bridgeport*. 645 F.Supp. 890 (D.Conn. 1986) (1871 Civil Rights Act); *King v. County of Nassau*, 581 F.Supp. 493 (E.D.N.Y. 1984) (Civil Rights Acts of 1866, 1871, and 1964); *Maloney v. Washington*, 690 F.Supp. 687 (N.D.Ill. 1988), 584 F. Supp. 1263, 1264-66 (N.D.Ill. 1984) (Civil Rights Act of 1866 and 1871); *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990) (Civil Rights Act of 1871); *Fludd v. Dykes*, 863 F.2d 822, 824 (5th Cir. 1989) (Civil Rights Act of 1871); *Esposito v. Buonome*, 642 F.Supp. 760 (D.Conn. 1986), 647 F. Supp. 580, 580 (D.Conn. 1986) (Civil Rights Act of 1871; see also *Parker v. Downing*, 547 So.2d 1180 (Civ. App. Ala. 1988) (Civil Rights Act of 1871).

That Congress did not intend section 1870 to sanction race-based peremptory challenges in civil cases is confirmed by the fact that the act of 1872 governed as well the exercise of peremptory challenges in criminal cases.[18] Although *Swain* and *Batson* reached differing conclusions regarding the appropriate method of proof, no member of this Court has doubted that the exercise of a race-based peremptory challenge by a government prosecutor would, if proven, constitute the type of invidious government action forbidden by the Constitution. In 1872, when many framers of the Fourteenth Amendment were still members of the House and Senate, there would assuredly have been an outcry of protest had Congress understood the proposed legislation to

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[18]See Appendix C.

authorize federal prosecutors to exercise, and federal judges to implement, race-based peremptory challenges in criminal cases. If the "peremptory challenges" authorized by the 1872 Act in criminal cases do not encompass race-based objections, it is difficult to see how the same phrase in the same statute could have a different meaning as applied to civil cases.

Undeniably the language and legislative history of section 1870 do not address directly the question of whether race-based peremptory challenges may be used to exclude minorities from a jury. But it is, at the least, a "reasonable alternative interpretation" of section 1870 that that provision does not authorize such discrimination; section 1870 should be construed in that manner to avoid the constitutional difficulties addressed by the courts below. As we set forth in part III, the federal courts possess inherent authority to forbid jury selection practices that discriminate on the basis or race. The general language of section 1870 certainly

cannot be said to evince any clear congressional intent to restrict that judicial power.

B. Such A Race-Based Exclusion Would Be Inconsistent With Federal Statutes Prohibiting Discrimination In Jury Selection

Even if the general provisions of section 1870, read in isolation, might appear to authorize removal of a juror because of a race-based peremptory challenge, the illegality of excluding a juror on that basis is clear under the more specific congressional legislation regarding racial discrimination in jury selection. Section 1870 should be interpreted in a manner consistent with these anti-discrimination laws. Two federal statutes prohibit discriminatory jury selection in broad language fully applicable to the exercise of race-based peremptory challenges by either government or private attorneys. Two other statutes confirm that that was precisely the intent of Congress.

1. 28 U.S.C. § 1862

Section 1862, adopted in its present form as part of the Jury Selection and Service Act of 1968, provides:

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States ... on account of race, color, religion, sex, national origin, or economic status.

Petitioner objected in the district court that venire-persons Combs and Simmons had indeed been excluded on account of their race from service as petit jurors in this case. The literal language of section 1862 is all-encompassing; it recognizes no exception for instances in which the discriminatory exclusion was achieved by means of a peremptory challenge, or where the invidious motive was that of a private attorney or litigant. Section 1862, which derives from the Civil Rights Act of 1875,[19] should like

[19]18 Stat. 335.

"other Reconstruction civil rights statutes ... be[] ... 'accord[ed] ... a sweep as broad as [its] language.'" *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

The manifest purpose of section 1862 was to provide "for the selection, without discrimination, of Federal grand and petit juries."[20] Congress believed that juries from which racial minorities had been systematically excluded would be more likely to return biased verdicts.[21] Other provisions of the 1968 legislation established detailed procedures designed to assure that minorities were not excluded from jury venires, either intentionally or because of practices with discriminatory effects. 28 U.S.C. §§ 1863-1866. Congress could not have intended to permit litigants to defeat this carefully crafted legislative scheme through the use of race-based peremptory challenges. "There is no point in taking elaborate steps to ensure that Negroes are included on

[20]H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News, 1792, 1792.

[21]H.R. Rep. No. 1076, 90thCong., 2d Sess., 8 (1968).

venires simply so they can then be struck because of their race by a ... use of peremptory challenges." *McCray v. New York*; 461 U.S. 961, 968 (1983). (Marshall J., dissenting from denial of certiorari).

The deliberate use of the term "excluded" in section 1862 leaves no doubt that the prohibition against discrimination applies to the use of peremptory challenges. In the Jury Selection and Service Act the word "excluded" is a term of art. Jurors deleted from a venire or removed from a jury panel are, depending on the reason, referred to in the Act as having been "disqualified,"[22] "excused",[23] "exempt"[24] or "excluded".[25] The phrasing of the statute was based on "a careful articulation of the grounds upon which

[22]28 U.S.C. § 1865 ("qualifications" of English literacy, etc.).

[23]28 U.S.C. §§ 1863(b)(5) (jurors "excused" because of "extreme inconvenience"), 1866(c)(1).

[24]28 U.S.C. § 1863(b)(6) ("exemptions" for public officials).

[25]28 U.S.C. §§ 1866(c)(2) (jurors "excluded" because of partiality), 1866(c)(4).

persons may be eliminated from jury service as: 'disqualified,' 'exempt,' 'excused' or 'excluded.'"[26] Under section 1866(c) a juror can be removed from a jury panel at the behest of a party only for cause or if "*excluded* upon peremptory challenge as provided by law." (Emphasis added).

The congressional purpose underlying the Civil Rights Act of 1875, which first prohibited racial discrimination in jury selection, would clearly be frustrated if black prospective jurors could be purged by means of race-based peremptory challenges. The principle concern of Congress was that all-white juries would be hostile to black litigants. Representative Morton argued:

> I ask if with the prejudices against the colored race entertained by the white race ... the colored man enjoys the equal protection of the laws, if the jury that is to try him for a crime or determine his property must be made up exclusively of the white race?.... I ask ... whether the colored men ... have the equal protection of the laws when the

[26]H. R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. and Admin. News, 1792, 1802.

> control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them, men who have been educated and taught to believe that colored men have no civil and political rights that white men are bound to respect.[27]

It was said that blacks could not "obtain justice in State courts because colored fellow citizens are excluded from the juries."[28] An end to discrimination in the selection of jurors was sought so that a black litigant might have among the jurors deciding his claims "those who would naturally have an interest in him."[29]

(2) 28 U.S.C. § 1861

Section 1861, also adopted as part of the Jury Selection and Service Act of 1968, provides in pertinent part:

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[27]Cong. Globe, 43rd Cong. 2d sess., 1793-95 (1875); see also *id.* at 427 (Rep. Stowell), 945 (Rep. Lynch), 1863 (Sen. Morton).

[28]Cong. Globe, 42nd Cong., 2d sess., 823 (Sen. Sumner) (1872).

[29]Cong. Globe, 43rd Cong. 1st sess., 3455 (Sen. Frelinghuysen) (1874).

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

Section 1861 is an authoritative guide to the correct interpretation of the jury selection provisions of Title 28, applicable to section 1862 as well as section 1870.

If, as petitioner alleges, prospective jurors Combs and Simmons were removed because they were black, the resulting jury was not "selected at random from a fair cross section of the community." Rather, the jury which tried this case was selected on the basis of race from what was, until the exercise of the peremptory challenges, a fair cross section of the community. Such a selection process flies in the face of the congressional policy announced in section 1861.

(3) 42 U.S.C. § 1981

Section 1981 provides in part that

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory ... to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

In *Georgia v. Rachel*, 384 U.S. 780 (1966), and *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court held that the provision assuring the "full and equal benefit of all laws and proceedings" guaranteed to a black litigant "the right to have his jurors selected without discrimination on the ground of race." 384 U.S. at 798, *citing Strauder*, 100 U.S. at 311-12. Section 1981 is violated when prospective jurors of the same race as a black litigant are excluded on account of race, since the proceedings which follow are different than those which would be afforded to whites, a difference sought solely because of the race of the black litigant and

the excluded jurors.[30] The discriminatory jury selection prohibited by section 1981 can as readily be achieved by peremptory challenges as by manipulation of the venire list; both forms of discrimination are equally prohibited.

Rachel and *Strauder* involved criminal prosecutions. But the application of section 1981 is not limited to discrimination by government officials. This Court held in *Runyon v. McCrary*, 427 U.S. 160, 170 (1976), that "§ 1981 ... reaches purely private acts of racial discrimination." The Court unanimously reaffirmed that interpretation of section 1981 in *Patterson v. McLean Credit Union*, 105 L.Ed.2d 132, 150 (1989) ("[W]e ... adhere to our decision in Runyon that § 1981 applies to private conduct"). If a private party had resorted to threats or

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[30]The equal benefit clause encompasses as well a guarantee that blacks will be accorded to the same degree as whites the protection afforded by state criminal proceedings. A statute, like certain of the slave codes, attaching a lesser degree of criminality to a crime against a black victim would violate section 1981. Thus section 1981 would apply to some race-based peremptories by criminal defendants, i.e. a peremptory challenge, in the trial of an inter-racial crime, intended to remove prospective jurors of the same race as the victim.

violence to prevent blacks from serving on the jury in this case, section 1981 would undeniably have afforded petitioner, and the prospective jurors, redress. See *Griffin v. Breckenridge*, 403 U.S. 88, 97-104 (1971). A fortiori section 1981 applies when a federal judge is asked "to compel ... discriminatory action [in the] federal courts." *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948).

Section 1981 would clearly apply to peremptory-based discriminatory jury selection in a contract action brought by a black plaintiff. The contract clause of section 1981 "covers wholly *private* efforts to impede access to the courts" by a black litigant seeking to enforce contractual rights. *Patterson*, 105 L.Ed.2d at 151 (emphasis in original). Surely the equal benefit clause of section 1981 provides the same protection when a plaintiff's claim sounds in tort rather than in contract. Were that not the case, section 1981 would preclude race-based peremptories in state court contract actions, but would allow the use of race-

based peremptories in a civil rights claim brought in federal court under sections 1981 and 1983. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64 (1987); *Wilson v. Garcia*, 471 U.S. 261 (1985).

4. 18 U.S.C. § 243

The only federal jury discrimination statute that contains the kind of state action requirement adopted by the court of appeals in this case is the criminal prohibition against discriminatory jury selection. The wording of the criminal provision is significant because it is deliberately narrower than sections 1861, 1862 and 1981. Section 243 of Title 18 provides:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such

cause, shall be fined not more than $5,000.

Section 243 is applicable only to "an officer or other person charged with any duty in the selection or summoning of jurors." Clearly counsel for respondent could not have been prosecuted under section 243, even if his racial motives were clear beyond any reasonable doubt.

Equally clearly, however, section 243 demonstrates that Congress knew full well how to place a state action requirement in federal law, and did so expressly when it desired such a limitation. Having enacted four different statutes prohibiting racial discrimination in the jury selection process, Congress deliberately chose to place a state action requirement only in section 243. The only plausible interpretation of this careful distinction is that Congress did not desire to limit sections 1861, 1862 and 1981 to conduct by "an officer", but intended those provisions to extend to all race-based action excluding blacks from juries, regardless of the status of the individuals involved.

III. THE FEDERAL COURTS HAVE INHERENT AUTHORITY TO DISMISS A CIVIL JURY ASSEMBLED BY MEANS OF RACE-BASED PEREMPTORY CHALLENGES

After the district judge in this case had removed prospective jurors Combs and Simmons, and empaneled the jury that ultimately heard the case, petitioner's objection was renewed.[31] At this juncture the issue was not whether section 1870 authorized the removal of Combs and Simmons, but whether the resulting jury should be permitted to try the case, or should be stricken because of the manner in which it was assembled. The district judge and the en banc court concluded that the jury in a case such as this could not be dismissed unless the exclusion of Combs and Simmons was itself unlawful. On the view of the en banc majority, if the removal of those black prospective jurors was not unconstitutional state action, "then the courts hold no warrant to interfere" with the resulting jury. (895 F.2d at 221).

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[31]Tr. 54-63.

The courts below adhered to an unduly constricted view of their authority, and responsibility, in dealing with jury panels assembled by means of race-based peremptory challenges. The federal courts possess broad inherent authority to take measures necessary to protect the integrity of judicial proceedings. This Court holds commensurately extensive supervisory powers over the manner in which proceedings are conducted in the federal courts. In the decades since *McNabb v. United States*, 318 U.S. 332 (1943), the Court has exercised that authority in a wide variety of circumstances. *McNabb* explained that the supervisory power could be invoked to "maintain[] civilized standards of procedure" and has been "guided by considerations of justice." 318 U.S. at 340-41. Surveying the diverse situations in which this power has been exercised, one commentator observed that the "common

denominator of its usage is a desire to maintain and develop standards of fair play...."[32]

This Court may interfere with the judgment or proceedings of a state court only when a violation of federal law or applicable constitutional requirements has occurred. But in dealing with federal proceedings, the federal courts have broader inherent authority, and "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). "[T]he appellate court[s] ... may ... require [trial courts] to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). In a number of instances the exercise of this supervisory power has led this Court to overturn judgments in federal

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[32]Note, 53 Geo. L.J. 1050, 1050 (1965).

cases despite sustaining similar state court judgments in essentially identical circumstances."

Few practices have greater potential impact on the integrity of the judicial process than the manner in which jurors are selected. The selection process is a sensitive one, all too easily skewed to unduly favor one party or group, and to undermine public confidence in the fairness of the federal courts. In *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), this Court invoked its supervisory power to overturn a civil jury verdict because wage earners had been systematically excluded from the jury at issue. That exclusion, the Court concluded, although not the subject of any express statutory prohibition, was inconsistent with "the high standards of jury selection" that ought to prevail in federal courts, 328 U.S. at 225, and tainted the resulting verdict with "class distinctions and discriminations which are

"*Compare Marshall v. United States*, 360 U.S. 310 (1959) *with Murphy v. Florida*, 421 U.S. 794 (1975); *compare Aldridge v. United States*, 283 U.S. 308 (1931), *with Ristaino v. Ross*, 424 U.S. 589 (1976).

abhorrent to the democratic ideals of trial by jury." 328 U.S. at 220. In *Ballard v. United States*, 329 U.S. 187 (1946), the Court again invoked its supervisory authority to forbid federal district courts from systematically excluding women from the jury rolls. The Court explained that the use of all-male juries "may at times be highly prejudicial to the defendants," and that such exclusionary practices worked an "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

This Court held that the juries in *Thiel* and *Ballard* should not have been permitted to try those cases, even though the manner in which the juries had been selected could not be said to have violated a specific, identified statutory or constitutional provision. The fact that a skewed or tainted jury may have been the result of peremptory challenges, rather than of the manner in which the venire was composed, does not reduce the Court's supervisory

authority. If, as a result of happenstance, the jury selected to hear a police brutality case was composed of twelve former police officers or of twelve ex-convicts, no sensible judge would hesitate to strike that jury and assemble a new one. The judicial responsibility is surely no less when the skewed nature of a jury is the result, not of coincidence, but of deliberate racial manipulation of the jury selection process.

The exclusionary practices in *Ballard* and *Thiel* concerned women and wage earners, respectively. The deliberate exclusion of blacks from civil and criminal juries is an abuse of unique gravity in our constitutional system. Discrimination against black prospective jurors was first condemned by this Court 110 years ago in *Strauder v. West Virginia*, 100 U.S. 303 (1880); over the course of the last century, even when other forms of discrimination were tolerated for a period under the ill-starred decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), this Court was ceaseless

in its efforts to eradicate race-based jury discrimination. If the federal courts have inherent supervisory authority to deal with jury discrimination involving women and wage earners, *a fortiori* they possess and should exercise that authority when the discrimination at issue is directed at racial minorities.

The deliberate exclusion of black jurors has a unique and long recognized capacity to destroy public confidence in the fairness of the courts.

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.... [It] destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion ... of Negroes ... impairs the confidence of the public in the administration of justice.... The harm ... is to society as a whole.

Rose v. Mitchell, 443 U.S. 545, 555-56 (1979). Such practices inevitably suggest "that justice in a court of law may turn upon the pigmentation of skin." *Ristaino v. Ross*, 424 U.S. 589, 596 n. 8 (1976). The decision in *Batson* was based on an express recognition that the exclusion of black

prospective jurors by means of race-based peremptories would "undermine public confidence in the fairness of our system of justice." 476 U.S. at 87. The court in *Williams v. Coppola*, 41 Conn. Supp. 48, 549 A.2d 1092, 1101 (Super. 1986), put the matter more bluntly:

> The use of peremptory challenges to remove all the possible jurors of one of the party's race seriously impairs the perception of justice. Members of a minority, under those circumstances, could never feel that they received a fair trial.

This Court has reiterated that maintaining public confidence in the fairness of the courts was a key purpose of the decision in *Batson*. *Holland v. Illinois*, 107 L.Ed.2d 905, 922 (Kennedy, J., concurring); *Allen v. Hardy*, 478 U.S. 255, 259 (1986).

The decisions below offer subtle analyses of the concept of state action. But such legal niceties are entirely irrelevant to the indelible impression that the exercise of race-based peremptory challenges can have on public confidence. Regardless of whether the action of a judge in implementing

such challenges is or is not technically unconstitutional, the parties, the public and the prospective jurors will inevitably regard the judge as "an accomplice to racial discrimination in the courtroom." *Maloney v. Washington*, 690 F. Supp. 687, 690 (N.D.Ill. 1988). When a racially hand-picked all-white jury in a racially sensitive case returns a verdict in favor of the white litigant, community concerns about unfairness will not be stilled by an admonition to read *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The decision of the Florida courts to bar race-based peremptory challenges in civil cases was the result, in part, of the state's tragic experience with the consequence of a collapse of public confidence in racially skewed juries.[34] In "the Kingdom of Heaven" even hand-picked all-white juries might be relied on to do justice between black and white litigants, *cf. Carter v. Jury Commission of Greene County*, 396 U.S. 320, 342 (1970) (Douglas, J., concurring); but here on earth

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[34]We set forth in Appendix D excerpts from the trial judge's opinion in *City of Miami v. Cornett*, 463 So.2d 399 (Fla. App. 3 Dist. 1985).

the public understandably shares the view of those who exercise race-based peremptories that the exclusion of black prospective jurors is likely to tilt the scales of justice in favor of a white litigant.

A court which condones the use of race-based peremptories does not, as the en banc court suggested, simply provide a "level playing field" on which the parties may do battle. (895 F.2d at 222). The decision below also gives the parties license to do battle with racial weapons of unique destructiveness; under that decision overtly race-based jury selection would inevitably become a part, perhaps the most critical part, of the trial of racially sensitive cases, if not of all cases in which the parties are of different races. The racially explicit brawling to which this would lead is starkly illustrated by *Maloney v. Washington*, 690 F. Supp. 687 (N.D.Ill. 1988). The white plaintiffs in *Maloney*, alleging that they were the victims of reverse discrimination, brought suit against the black mayor of Chicago. Although

the gravamen of the complaint was an insistence that all government action should be strictly color blind, the plaintiffs "apparently concluded that they would prefer to have their case tried by members of their own race." *Id.* at 688. The plaintiffs utilized all of their peremptory challenges against blacks; the defendants responded by using all of their challenges against whites. When a mistrial was declared on unrelated grounds, the trial judge warned counsel not continue making race-based peremptory challenges; counsel for both sides disregarded that admonition, forcing the court to strike the second jury and impose sanctions. 690 F.2d at 689-92.

Strauder and its progeny contemplated that the courts would be a safe harbor from the often virulent bigotry of an earlier era; today, when overt racism is regarded as unacceptable in most aspects of American life, the decision below threatens to turn the federal courts into an arena when express exploitation of race will be entirely acceptable, and

even commonplace. Federal judges should not stand idly by while civil cases are manipulated through manifestly racial tactics. "For racial discrimination to result in ... exclusion from jury service ... is at war with our basic concepts of a democratic society." *Smith v. Texas*, 311 U.S. 128, 130 (1940). "[I]n such a war the courts cannot be pacifists." *People v. Wheeler*, 583 P.2d 748, 755, 148 Cal. Rptr. 890 (1978).

The Fifth Circuit insisted that by tolerating race-based peremptories the courts merely took a position of neutrality with regard to the litigants "in their dealings with each other." (895 F.2d at 225). But race-based peremptories, even if resorted to equally by both sides, have a direct impact on innocent third parties -- the jurors excluded on account of race.

> [T]he exclusion of Negroes from jury service ... denies the class of potential jurors the "privilege of participating equally ... in the administration of justice," ... and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting "a

> brand upon them ... an assertion of their inferiority."

Peters v. Kiff, 407 U.S. 493, 499 (1972) (opinion of Justice Marshall). *Swain* expressly recognized the injury caused to prospective jurors when

> the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. Th[is] en[d] the peremptory challenge is not designed to facilitate or justify.

380 U.S. at 224.[33] "The reality is that a juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation...." *Holland v. Illinois*, 107 L.Ed.2d 905, 922 (1990) (Kennedy, J., concurring). The right to participate as a juror in the administration of justice, like the right to participate as a voter in the democratic process, cannot be denied on account of race, even if the impetus for that denial

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[33]Compare Cong. Rec., 42nd Cong., 2d sess., 900 (1872) (Sen. Edmunds) (prohibition against discrimination in jury selection required so that the black "population shall feel and the white population shall feel that they participate equally and fairly in the administration of justice and in the protection of private rights.")

comes to some degree from individuals who are not on the public payroll. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

The jury selection practices at issue in this case are in all respects more harmful to the due administration of justice than the practices condemned in *Thiel* and *Ballard*. The Court should exercise its supervisory power to direct the federal courts not to try cases before juries selected by means of race-based peremptory challenges.

CONCLUSION

Were the Court to reach the constitutional question considered below, we would urge the Court to hold that in a civil case the removal of a prospective juror because of a race-based peremptory challenge is unconstitutional. The instant case, however, may more appropriately be resolved on non-constitutional grounds. For the above reasons the en

banc decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Statutory Provisions Involved

Section 243, 18 U.S.C., provides:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

Section 1861, 28 U.S.C., provides:

> Declaration of Policy. It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United

States, and shall have an obligation to serve as jurors when summoned for that purpose.

Section 1862, 28 U.S.C., provides:

> Discrimination Prohibited. No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States and the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

Section 1870, 28 U.S.C., provides in pertinent part:

> Challenges. In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

Section 1981, 42 U.S.C., provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and

proceedings for the security of persons and property as is enjoyed by white citizens....

APPENDIX B

State Decisions Regarding The Impact of Race-Based Peremptories

(1) *Commonwealth v. Soares*, 387 N.E.2d 499 (Sup. Jud. Ct. Mass. 1979). The lack of any prohibition against race-based peremptory to challenges

> "would leave the right to a jury drawn from a representative cross-section of the community wholly susceptible to nullification through the intentional use of peremptory challenges to exclu[de] identifiable segments of the community.... It is [the] very diversity of opinion among individuals, some of whose concepts may well have been influenced by their group affiliations, which is envisioned when we refer to 'diffused impartiality.' No human being is wholly free of the interests and preferences which are the product of his cultural, family, and community experience. Nowhere is the dynamic commingling of the ideas and biases of such individuals more essential than inside the jury room....
>
> Given an unencumbered right to exercise peremptory challenges ... [t]he party identified with the majority can altogether eliminate the minority from the jury.... The result is a jury in which the subtle biases of the majority are permitted to operate, while those of the minority have been silenced."

387 N.E.2d at 515-18. When a party

> "challenges a Negro in order to get a white juror in his place, he does not eliminate prejudice in exchange for neutrality; ... [H]e is, in fact, willy nilly taking advantage of racial divisions to the detriment of the [opposing party]."

387 N.E.2d at 516 n. 31.

> "The absence of a group from petit juries in communities ... may lead to jury decision making based on prejudice rather than reason. White jurors, satisfied that blacks will never sit in judgment upon themselves or their white neighbors, can safely exercise their prejudices."

387 N.E.2d at 512 n. 20.

(2) *People v. Wheeler*, 583 P.2d 748, 761, 148 Cal. Rptr. 890 (1978):

> "[w]hen a party ... peremptorily strikes all [members of a racial minority] for that reason alone, he ... frustrates the primary purpose of the representative cross-section requirement. That purpose ... is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority."

(3) *Williams v. Coppola*, 549 A. 1092, 1097-98, 41 Conn. Sup. 48 (Super. 1986):

> "If a party were to have the unfettered right to exercise peremptory challenges for any reason, the right to trial by an impartial jury would lose its meaning. So, if blacks could be struck from the jury merely because they were black, there would be no purpose in taking elaborate steps to guarantee their inclusion in the venire. ... Tools that deprive a party of a trial by an impartial jury or even the perception of such a trial have no place in a constitutional democracy."

(4) *People v. Thompson*, 435 N.Y.S. 2d 739, 751-52, 79 A.D.2d 87 (1981):

> "[W]e agree ... that viewing the jury as a whole, permitting the unencumbered exercise of peremptory challenges does anything but ensure the selection of an impartial jury.... [T]he unfettered use of the peremptory challenge on the basis of race may, in and of itself, ultimately defeat the ... right to trial by a jury drawn from a fair cross-section of the community."

(5) *State v. Neil*, 457 So.2d 481, 486 (Fla. 1984):

> "Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury.... The primary purpose of peremptory challenge is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group

> from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury.... [W]e find that adhering to the *Swain* test of evaluating peremptory challenges impedes, rather than furthers, Article I, section 16's guarantee."

APPENDIX C

17 Stat. 282 (1872)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of the act entitled "An act regulating proceedings in criminal cases, and for other purposes," be, and the same is hereby, amended to read as follows:

"Sec. 2. That when the offence charged be treason or a capital offence, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges,

whether to the array or panel, or to individual jurors, for cause or favor, shall be tried by the court without the aid of triers."

APPENDIX D

Trial Court Opinion in *Cornett v. City of Miami*.

Reported in *City of Miami v. Cornett*, 463 So.2d 399, 400-01 (Fla. App. 3 Dist. 1985).

> "This trial commenced shortly after verdicts had been returned in two other much publicized cases. In the latter of the two cases, the county's school superintendent, a black, was indicted, suspended from office, then convicted of grand theft. The Superintendent was tried before an all-white jury after a number of blacks had been challenged peremptorily. In the earlier case, an all-white jury acquitted several white officers of murder and manslaughter charges in the beating of a black insurance agent -- the infamous 'McDuffie Case'. All prospective black jurors had been challenged, some for cause, most peremptorily. Moments following the verdict in that case there was a civil disturbance in the community resulting in millions of dollars of property damage and several deaths. Those killed included whites and blacks, and in a few instances the motives were clearly racial. Judicial notice is taken of these background circumstances as they shed light on community tensions in general at the time of this trial and the probable effect on the conduct of this trial. Some white prospective jurors admitted that they couldn't be fair. At least one admitted to being fearful and asked to be excused.
>
> * * *
>
> "The misuse of the peremptory challenge to eliminate identifiable groups contributes to an

> undermining of the integrity of the justice system. Unquestionably there are cases where the outcome of the trial has been determined by the composition of the jury -- with results contrary to the weight of the evidence. The existence of such an unimpaired ability to manipulate the outcome of a trial is a legitimate reason for doubt as to fairness. It then becomes the responsibility of the court to minimize that potential for abuse by imposing some reasonable limitations on the exercise of the challenge. This is essential if the community is to have confidence in the jury trial process. The facts, the issues raised, and the timing of the trial are circumstances which in combination made this case an extremely sensitive one.

(9)

No. 89-7743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THADDEUS DONALD EDMONSON,

Petitioner,

—v.—

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with over 275,000 members dedicated to the principles of individual liberty and equality embodied in the Constitution and civil rights laws of this country. As part of its commitment to legal equality, the ACLU has long opposed any and all forms of racial discrimination in the administration of justice.

Thus, the ACLU represented petitioner in *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986), the first federal case holding that a prosecutor's use of peremptory challenges to screen prospective jurors on the basis of race violates the Constitution. In addition, the ACLU participated as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986); *Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803 (1990); and *Powers v. Ohio*, 89-5011 (argued Oct. 9, 1990).

The issue in this case is whether *Batson* should be applied to civil litigation. Because that issue touches on matters of longstanding concern to the ACLU, we respectfully submit this brief as *amicus curiae* in support of petitioner.

STATEMENT OF THE CASE

The petitioner in this case, a black male injured on a construction site in a federal enclave, brought a negligence action against respondent in federal court. During *voir dire*, respondent utilized two of his three statutorily-granted peremptory challenges, *see* 28 U.S.C. §1870, to excuse two venire members who were black. Petitioner objected to those exclusions on the basis of *Batson v.*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Kentucky, 476 U.S. 79 (1986), asking the district court to require respondent to articulate a neutral reason for the manner in which it utilized its challenges. The district court denied petitioner's request on the grounds that *Batson* does not apply to civil proceedings. Jury selection then continued, and eleven whites and one black were eventually empanelled.

After trial, the jury rendered a verdict for Edmonson and concluded that his damages totalled $90,000. The jury also found, however, that petitioner's own negligence was responsible for 80% of the damage and, consequently, reduced the final award to $18,000. Edmonson appealed, relying on the argument that *Batson*'s prohibition of racially discriminatory peremptory challenges applied to private civil litigants. The Fifth Circuit, sitting *en banc*, affirmed the trial court in a closely divided decision. *Edmonson v. Leesville Concrete Co., Inc.*, 895 F.2d 218 (5th Cir. 1990).[2]

SUMMARY OF ARGUMENT

In *Batson v. Kentucky*, 476 U.S. 79, this Court held that a prosecutor's use of peremptory challenges to bar prospective jurors solely because of their race violates the Equal Protection Clause. The question in this case is whether the same principle should apply when the discriminatory challenges are exercised by private litigants in a civil trial. Contrary to the view of the court below, we believe that the principle of *Batson* can and should be applied under the circumstances of this case.

As this Court has recognized for well over a century, the racial exclusion of jurors offends several important interests. First, it denies the affected litigant the right to be tried by a jury that has not been racially gerrymandered. Second, it stigmatizes the excluded juror and the racial group of which he or she is a member. Third, it undermines the community's confidence in the fairness and integrity of the judicial process. Each of these interests was integral to the Court's decision in *Batson*. Each of these interests is also affected when race becomes the critical ingredient for inclusion on a civil jury.

We are mindful, of course, that the existence of an injury does not automatically establish a constitutional violation. In this case, however, there are more than enough indicia of state involvement to satisfy this Court's state action doctrine. It is the state that summons prospective jurors and that can prosecute them if they disregard the summons. It is the state that organizes the jury pool and assigns specific jurors to specific trials. Particularly in federal court, it is the trial judge who largely conducts the *voir dire* and thus sets the context in which peremptory challenges are exercised. It is the state that creates peremptory challenges and determines the number that will be available in any given case. It is the state that enforces the peremptory challenge by excluding the targeted juror. And it is the state that pays the selected jurors for their jury service. In short, the state is a necessary and indispensable party to the jury selection process. Given this integral role, the state cannot lend its hand to overt acts of racial discrimination. When it does, it can and should be held accountable under the Constitution.

At the same time, we urge this Court to follow the course it adopted in *Batson* and avoid reaching the issue of whether criminal defense counsel are equally constrained in their use of peremptory challenges. The application of *Batson* to criminal defense counsel involves a host of difficult constitutional questions that

[2] Petitioner's *Batson* claim was originally accepted by a panel of the Fifth Circuit, *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir. 1990), but their decision was vacated when the motion for *en banc* review was granted.

simply are not presented in this record. These include, among others, the question of whether *Batson* can be enforced without violating the Fifth Amendment guarantee against self-incrimination and the Sixth Amendment guarantee of effective assistance of counsel. Such a delicate balancing of countervailing constitutional issues should only be decided on an appropriate record and after full briefing by the parties. Neither exists in the present case.

ARGUMENT

I. THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACK JURORS FROM A CIVIL JURY SUBSTANTIALLY AFFECTS THE RIGHTS OF PARTIES, JURORS AND THE COMMUNITY-AT-LARGE

For more than a century, this Court has recognized that the exclusion of jurors solely on the basis of race offends several distinct interests. First, it diminishes the right of the affected party to a jury selected without bias. Second, it denies the excluded juror an equal opportunity to participate in the administration of justice and, by extension, stigmatizes the racial group to which the excluded juror belongs. Third, it diminishes the confidence of the community-at-large in the fairness and integrity of the judicial process.[3] *See e.g., Carter v. Jury Commission*, 396 U.S. 320, 329-30 (1970); *Ex parte Virginia*, 100 U.S. 339, 345 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

In *Batson v. Kentucky*, 476 U.S. 79, the Court relied

[3] By contrast, this Court has recognized that the race-neutral use of peremptory challenges can promote confidence in the judicial process. *See e.g., Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803; *Batson v. Kentucky*, 476 U.S. at 91.

on those interests to hold that a prosecutor's use of peremptory challenges in a racially discriminatory fashion violates the Equal Protection Clause. This case involves private parties rather than a public prosecutor and the issues that raises are discussed below. *See* Point II, *infra*. It is, nonetheless, important to note at the outset that the same interests this Court regarded as significant in *Batson* are also implicated by the facts of this case.

A. The Parties

Batson holds that a prosecutor's use of peremptory challenges to exclude potential black jurors solely because of their race abridges a defendant's constitutional right to an "indifferently-chosen" jury. 476 U.S. at 86-87 (citation omitted). In explaining the basis for its holding, the *Batson* Court observed that a jury selected on race-neutral grounds is essential to "our system of justice [in order to] safeguar[d] a person accused of a crime against the arbitrary exercise of power by a prosecutor or judge." *Id.* at 86 (footnote and citations omitted).

Here, a black litigant objected to his opponent's apparent attempt to purge black jurors from the jury panel in a civil case. The fact that this is a civil case, however, does not diminish petitioner's right to an "indifferently-chosen" jury. As Chief Justice Rehnquist has noted, "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption . . . ." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, J., dissenting).

While it is true that the stakes are generally higher for a criminal defendant whose liberty or even life is in jeopardy than for a civil litigant, the interests and rights vindicated in civil proceedings are by no means trivial. As the ultimate triers of fact, civil juries play a crucial role in determining whether and to what degree relief should be granted to those who have been wrongly de-

prived of their property, livelihood, health, or even family members, as a result of the negligent or intentional acts of others. In addition, civil juries routinely decide whether and to what extent to compensate those claiming violation of their constitutional and civil rights at the hands of federal agents or as a result of the conduct of persons acting under color of state law.

In the present case, petitioner has brought a personal injury action. Were Edmonson a plaintiff in a civil rights case in which a defendant used its peremptory challenges to ensure that blacks were excluded from the jury, petitioner's injury would doubtless be more palpable and clear. However, even in a personal injury case, a party is harmed when racial bias is allowed to affect the jury. As the Court noted in *Peters v. Kiff*, 493 U.S. 493, 503 (1972): "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[4] That observation is just as valid and just as significant in civil litigation.

B. The Jurors

The exclusion of jurors on the basis of race does more than harm the interests of the affected party. It also violates the equal protection rights of the excluded juror and stigmatizes the racial group to which the excluded juror belongs.[5] Indeed, this Court's first jury exclusion decision largely rested on these grounds. Thus, in *Strauder v. West Virginia*, the Court wrote:

> The very fact that colored people are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

100 U.S. at 308.

Nothing in this description of the injury suffered by excluded jurors is unique to service on a criminal jury, as opposed to a civil jury. The right of jurors to participate regardless of their race in the "administration of the law" is not confined to the administration of criminal law. The breakthrough in *Batson* was recognizing that a juror excused on racial grounds during the peremptory challenge phase of a trial suffers an injury identical to that experienced by those excluded on the same basis from the broader juror pool. Once that principle is established, it follows that exclusion of jurors from a civil petit jury is similarly harmful.[6]

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[4] *See also Ballard v. United States*, 329 U.S. 187, 193-94 (1946)(exclusion of women from federal juries "may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded").

[5] For that reason, this Court has held that members of the excluded group have standing to challenge racially discriminatory jury selections. *Carter v. Jury Commission*, 396 U.S. at 329-30.

[6] The Equal Protection Clause prohibits otherwise qualified members of the community from being excluded from consideration for jury service on the basis of race regardless of whether they would ultimately find themselves participating on civil or criminal venires. This makes particular sense in the federal system where, in general, no at-

(continued...)

C. The Community

Finally, this Court has held that not only the stigmatized group, but the entire community is injured by selection procedures that purposefully exclude persons from criminal juries on the basis of race and thereby undermine public confidence in the fairness of our system of justice. *Batson v. Kentucky*, 476 U.S. at 86; *Ballard v. United States*, 329 U.S. at 195. Public confidence is no less certain to be shaken when the perceived message is that blacks are somehow unfit to serve as civil jurors than it is when they are deliberately excluded from participating in criminal trials. Here again, it is impossible to distinguish between the harm caused by racial discrimination in the criminal context and that occurring in its civil counterpart.

In addition to serving the same antidiscriminatory purpose in civil as well as criminal *voir dires*, extending *Batson*'s requirement to come forward with a nonpretextual, racially neutral explanation for a peremptory challenge would not prejudice a civil litigant any more than it does the prosecution in a criminal trial. Thus, the policies underlying the *Batson* Court's extension of equal protection analysis to peremptory challenges in the criminal context are equally applicable to civil trials where minority group members are barred from jury service solely because of their race.

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[6] (...continued)
tempt is made to distinguish between those called to participate in civil venires and those sent to criminal venires until all those called to serve as jurors are gathered in the federal courthouse and divided up.

II. THE STATE PLAYS A CRITICAL ROLE IN THE JURY SELECTION PROCESS AND THUS THE EXCLUSION OF JURORS ON RACIAL GROUNDS VIOLATES THE CONSTITUTION EVEN IN A CIVIL ACTION

The critical question in any state action inquiry is whether there is a "sufficiently close nexus" between the state and the challenged conduct of a nominally private party so that the challenged conduct may fairly be attributed to the state. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)(*citing Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351 (1974)). That inquiry is necessarily fact-specific, for as this Court has noted: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

Here, the state's involvement in the jury selection process is so pervasive that the decision to exclude potential jurors on the basis of race, even if initiated by a private party in civil litigation, can and should be "charge[d]" to the state. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).[7] Simply put, the state has provided both the opportunity and means for the discrimination to take place. Under this Court's established case law, that involvement is more than enough to hold the state responsible when discrimination occurs. *See*

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[7] The court below erred in its singleminded search for "a single state actor of undisputed stature." 895 F.2d at 230-31 (Rubin, J., dissenting). Instead, its focus should have been on the relationship between the state and the challenged conduct. For example, in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court held that the state may be responsible for the ineffective assistance of counsel regardless of whether counsel is provided by the state or privately obtained, and regardless of whether or not the attorney is deemed a state actor. *Polk County v. Dodson*, 454 U.S. 312 (1981), is not to the contrary, despite the view of the majority below. *See* pp.16-17, *infra*.

Reitman v. Mulkey, 387 U.S. 369, 378 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. at 722.

To begin with, there would be no peremptory challenges without the state. As this Court has frequently held, there is no constitutional right to a peremptory challenge. *Batson v. Kentucky*, 476 U.S. at 91; *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Stilson v. United States*, 250 U.S. 583, 586 (1919). Instead, peremptory challenges are entirely a creature of statute. The state not only determines whether they will exist, but how many are available in any particular case.[8]

In addition, the peremptory challenges in this case were exercised in the context of a jury selection process that is the subject of extensive congressional legislation applicable to both civil and criminal jury trials. The policy underlying the statutory scheme is set forth in 28 U.S.C. §1861:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service . . . .

[8] The statutory authorization for the peremptory challenges asserted by respondent in this case is found in 28 U.S.C. §1870, which provides for three peremptory challenges per party in civil cases. In a multi-party action the number of peremptory challenges, while not set by statute, is controlled by the trial judge, an undisputed state actor. The facts of this case, therefore, easily meet the requirement in *Lugar* that the privilege or rule of conduct responsible for the deprivation must have been created by the state. 457 U.S. at 937.

The next section states the antidiscriminatory policy undergirding federal jury selection and service even more plainly: "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status." *Id.* at §1862.

The legislative history of the Jury Selection and Service Act of 1968 expands on the primary purpose of the legislation, explaining that the Act was intended to provide methods for the random selection of juror names and the determination of juror disqualifications, exemptions and excuses in a manner that would "establis[h] an effective bulwark against impermissible forms of discrimination and arbitrariness." H.Rep. No. 1076, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. Code Cong. & Admin. News 1792, 1793. The harm found in *Batson* to be caused by discriminatory peremptory challenges is irreconcilable with this legislative goal.[9] Race-based peremptory challenges perpetuate the very evil that Congress sought to eradicate when it enacted the provisions of the Jury Selection and Service Act, 28 U.S.C. §§1861-69.

In order to effectuate its antidiscriminatory policy, Congress set forth in considerable detail the procedures for random jury selection, 28 U.S.C. §1863, the preparation of the master juror wheel and the completion of juror qualification forms, *id.* at §1864, the qualifications for jury service, *id.* at §1865, and the manner in which

[9] Unlike the extensive state regulation of nursing homes in *Blum v. Yaretsky*, 457 U.S. 991, or the regulation of a private school in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) -- neither of which regulatory schemes were deemed to have directly addressed the private acts challenged in those cases in a manner that sufficiently implicated the state -- the federal jury selection legislation is not only extensive, but is directly linked to the challenged conduct in this case.

jury panels are to be selected and summoned, *id.* at §1866. These provisions directly obligate the federal courts to follow particular procedures in selecting juries. Jurors are also paid a *per diem* fixed by statute, *see* 28 U.S.C. §1871, thus becoming "at least in some sense public servants charged with important responsibilities." *Edmonson*, 895 F.2d at 232 (Rubin, J., dissenting)(*citing* Alschuler, "The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts," 56 U.Chi.L.Rev. 153, 197 (1989)). As a result of these statutory provisions, jurors are placed in the position of being the victims of race-based discrimination only because the government summons people for jury service at a specific time and place, 28 U.S.C. §§1861-1869, and under threat of criminal prosecution. *Id.* at §1864(b). Once gathered, a clerk or other court employee divides the jurors into venires, assigns them to a particular case and directs each venire to the appropriate room. This Court has long held that state compulsion is indisputably a factor pointing to a finding of state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. at 939; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 169-71 (1970); *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963).

Nor does the state's involvement in jury selection cease once the *voir dire* begins. In the federal system, many of the judges actually conduct *voir dire* themselves, thus increasing state involvement. Alschuler, *supra*, at 158. The Federal Rules of Civil Procedure explicitly grant the court discretion to determine the degree of participation, if any, of counsel and parties in *voir dire*. Fed.R.Civ.P. 47(a). Those aspects of the jury selection process that are not set by statute -- such as the number of venire members requested for a particular case, determination of which challenges for cause will be granted, the manner and order in which peremptory challenges are to be exercised -- do not devolve upon private litigants, but are left to the discretion of the trial court. By setting the context in which peremptory challenges are

made, the court significantly affects whether and when a private litigant will decide to challenge a juror.

In addition, the race-based peremptory challenges occur exclusively on federal property, either in federal courtrooms or federal judges' chambers. As a result, the imprimatur of the state is placed upon the jury selection in general and on the use of peremptory challenges specifically. The state in its judicial garb is omnipresent and omnipotent throughout the process. Indeed, it is hard to imagine circumstances in which the state could be more intertwined with private acts. Just as the state is implicated in discrimination by a private restaurant located in a public building, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, it must also be implicated in jury discrimination by an attorney in a public proceeding in a public courthouse.

Finally, judicial enforcement is necessary to give effect to defense counsel's race-based challenges[10] and ju-

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[10] In extending *Batson* to civil suits, the Eleventh Circuit based its finding of state action for equal protection purposes on this rationale alone. *See Fludd v. Dykes*, 863 F.2d 822, 828 (11th Cir. 1989); *accord Thomas v. Diversified Contractors, Inc.*, 551 So.2d 343, 345 (Ala. 1989) (adopting reasoning and result of *Fludd*). The Eleventh Circuit observed:

> When blacks are excluded from jury service on account of their race, the Supreme Court has long recognized that the discriminatory actor is the trial court -- even when the decision to exclude blacks may have originated in another state entity, such as the legislature.
>
> • • •
>
> [U]ntil the trial judge overrules a party's objection to the racial composition of the venire, the law treats any previous decision on the part of a state entity to discriminate as harmless, insofar as the objecting party is concerned.

Fludd, 863 F.2d at 828 (*citing, inter alia, Strauder*, 100 U.S. at 312) (trial court erred in overruling *Strauder*'s challenge and in refusing to

(continued...)

dicial enforcement of race discrimination is itself discriminatory state action. *Barrows v. Jackson*, 346 U.S. 249 (1953)(judicial award of damages); *Shelley v. Kraemer*, 334 U.S. 1 (1948)(judicial enforcement of discriminatory restrictive covenant). Although "[p]rivate biases may be outside the reach of the law . . . the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Unlike statutes of limitations, which are self-executing, *see Texaco, Inc. v. Short*, 454 U.S. 516 (1982), peremptory challenges do not become operative until enforced by the judge.[11] They thus resemble the statutory nonclaim provision that this Court found amenable to constitutional challenge in *Tulsa Collection Services v. Pope*, 485 U.S. 478, 485-86 (1988), because it could only be enforced by judicial action. Specifically, the Court ruled that the "intimate involvement" of the probate court in enforcing a hospital administrator's refusal to pay the medical expenses requested by a decedent's estate was sufficient to trigger constitutional scrutiny. *Id.* at 487.

Here, the involvement of the federal court with jury selection in general and peremptory challenges in particular is at least as great as that of the probate court with the administrator in *Tulsa Collection Services*. The at-

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[10] (...continued)
quash panel); *Virginia v. Rives*, 100 U.S. 313, 322 (1879)(the "final and practical denial" of the accused's right to have blacks on the venire is in the judicial tribunal); *Neal v. Delaware*, 103 U.S. 370, 397 (1880)(refusal of court to redress wrong committed by state officials who excluded blacks from the venire was denial of defendant's constitutional rights).

[11] They are therefore more like the statutory prejudgment attachment procedures invoked by a private creditor and executed against a debtor's property by a state official in *Lugar*, than the private takings which were not state action in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

tempt by a private litigant to exclude potential jurors on race-based grounds intimately involves the court throughout and only becomes operative when the presiding judicial officer enforces the challenge by expressly directing the challenged juror to leave. This is precisely the type of situation in which state action exists as a result of a private party "mak[ing] use of state procedures with the overt, significant assistance of state officials." *Tulsa Collection Services*, 485 U.S. at 486 (*citing Lugar v. Edmondson Oil Co.*, 457 U.S. 922). Where the state has set all the relevant parameters in which the challenge is made and has actively enforced -- as opposed to merely approved of, acquiesced in, or subsequently responded to the initiatives of a private party -- private conduct may be fairly attributable to the state. *See Blum v. Yaretsky*, 457 U.S. at 1004-05; *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 164-65; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974).

Moreover, the exercise of peremptory challenges occurs during the only stage of a civil trial where the state is charged not only with ensuring a fair trial to the parties before the court, but also with the overarching responsibility to safeguard the rights of the venire members and the community so that they are guaranteed the opportunity to "'shar[e] in the administration of justice [as] a phase of civic responsibility.'"[12] *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975)(*quoting Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946)(Frankfurter, J., concurring)). *See Carter v. Jury Commission*, 396 U.S. at

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[12] The unique nature of jury selection and the sheer number of contacts between the state and the parties, the state and the jurors, and the state and the community-at-large during the *voir dire* easily distinguish peremptory challenges from other strategic decisions made by counsel during the course of a trial. As a result, extension of the Fifth and Fourteenth Amendment's prohibitions of discrimination to peremptory challenges will not lead down a "slippery slope" towards the constitutionalization of all stages of civil proceedings.

329-30.

Nor, contrary to the majority opinion below, does this Court's holding in *Polk County v. Dodson*, 454 U.S. 312, preclude a finding of state action in the judicial enforcement of private counsel's peremptory challenges. In *Polk County*, the Court declined to find state action where an indigent criminal defendant sought to sue his state-appointed attorney for damages under 42 U.S.C. §1983 in connection with her determination that an appeal would be frivolous. *Polk County* relied heavily on the fact that the public defender was an adversary of the state in a criminal proceeding brought by the state -- a situation that obviously does not exist in the instant case. The Court found that at the very least such a posture made characterization of the public defender as a state actor incongruous. *Cf. NCAA v. Tarkanian*, 488 U.S. 179, ___, 109 S.Ct. 454, 464 & n.16 (1988).

In any event, *Polk County* is not controlling in the case at bar for several reasons. First, this Court reserved in *Batson* the very issue that the majority erroneously claims *Polk County* had previously disposed of -- namely, whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.[13] *Batson*, 476 U.S. at 89 n.12. Second, *Polk County* clearly does not insulate the actions of private professionals from state action scrutiny, even where those actions are taken in accordance with professional discretion and judgment. *See West v. Atkins*, 487 U.S. 42, 52 (1988). Third, *Polk County*'s holding that a public defender is not a state actor when she determines whether or not to file an appeal in an individual case, is not dispositive of whether the same attorney may be a state actor for other purposes. *Compare Polk County with Branti v. Finkel*, 445 U.S. 507 (1980)(public defender acts under color of law when hiring and firing on behalf of the state). Fourth, as noted above, state action may be present even where the individual whose acts are being challenged is not a state actor. *Cuyler v. Sullivan*, 446 U.S. 335.

[13] The *Batson* Court did not specify whether it was referring to publicly assigned counsel or to retained counsel when it reserved this issue. However, in *Cuyler v. Sullivan*, 446 U.S. 335, the Court agreed that the same Fourteenth Amendment test should be applied to both assigned and retained counsel. *Id.* at 344-45.

At most, *Polk County* holds only that state employment does not, by itself, make a defense attorney a state actor. Moreover, in the case at bar the state is far more intertwined with the attempts of a private attorney to exclude blacks from a petit jury than with the essentially private decision in *Polk County* whether to write an appellate brief on behalf of a client. Where the state has a duty to provide effective assistance of counsel to defendants, it is responsible for protecting them from the failures of their attorneys, whether public or private. *Cuyler v. Sullivan*, 446 U.S. 335. Similarly, where the state has a duty to the jurors it summons into court, it is responsible for protecting them from the discriminatory acts of attorneys, whether public or private. In this respect, the jurors are not like the voluntary nursing home patients in *Blum v. Yaretsky*, 457 U.S. 991, who could not hold the state responsible for the actions of their doctors, notwithstanding state funding and regulation of the nursing homes. Instead, the jurors are like the prisoners in *West v. Atkins*, 487 U.S. 42, to whom the state was responsible for the actions of the private physician who contracted with the state to treat prisoners.

In short, the nexus between the state and the discriminatory acts is sufficient to establish state action in this case and to invoke the principle of nondiscrimination so forcefully articulated by this Court in *Batson*.

III. THE EXTENSION OF *BATSON* TO CRIMINAL DEFENSE COUNSEL RAISES SIGNIFICANT AND UNIQUE CONSTITUTIONAL QUESTIONS THAT SHOULD NOT BE RESOLVED, EVEN BY IMPLICATION, UNTIL PROPERLY PRESENTED

A decision by this Court that *Batson* does not apply to private litigants in a civil trial because state action is missing would go a long way toward resolving the lingering question of whether *Batson* applies to criminal defense counsel.[14] On the other hand, a finding of state action in civil litigation would not necessarily mean that criminal defense counsel are similarly bound by *Batson*'s ban on the race-based used of peremptory challenges. The role of defense counsel as an adversary of the state in criminal proceedings may affect the state action determination. *See* p.16, *supra*. And, even if state action exists, the application of *Batson* to criminal defense counsel raises serious constitutional questions that simply are not present in civil trials and that may well require a different constitutional balance.

Among the questions that need to be resolved are: (1) whether *Batson* is consistent with the Sixth Amendment's guarantee of effective assistance of counsel; (2) whether *Batson* can be enforced without violating a criminal defendant's Fifth Amendment right to remain silent; and (3) whether *Batson* would provide an avenue for discovery that is already available in civil litigation but generally not available to the prosecution in criminal cases.

[14] The issue of defense counsel was raised but not resolved in *Batson* itself. 476 U.S. at 89 n.12. Since *Batson*, the issue has generated a great deal of scholarly commentary, *see e.g.*, Goldwasser, "Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial," 102 Harv.L.Rev. 808 (1989)(arguing against extending *Batson* to defense counsel); Alschuler, *supra*, p.12.

In addition, any serious consideration of extending *Batson* to criminal defense counsel would have to take into account: (1) the different burden of proof in civil and criminal litigation; (2) the disproportionate resources generally available to the state in criminal trials; (3) the different roles and responsibilities of defense counsel and prosecutor in a criminal proceeding; and (4) the risk of fine, imprisonment, and even death that criminal defendants can, and do face if convicted by a jury.

As *amicus curiae*, we do not express any view on these questions other than to note they are difficult and unique to the criminal process. We therefore urge the Court to refrain from saying anything in the context of this case that may prejudge the very separate issue of whether *Batson* can or should be applied to criminal defense counsel. Instead, the Court should reserve that issue, as it did in *Batson*, for another day when it can be briefed by the parties and considered by the Court on a full and focused record.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

Respectfully submitted,

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Dated: November 15, 1990

(10)

NO. 89-7743

In the Supreme Court of the United States

OCTOBER TERM 1990

THADDEUS DONALD EDMONSON,
Petitioner

versus

LEESVILLE CONCRETE CO.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE, LOUISIANA ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF LEESVILLE CONCRETE CO., RESPONDENT

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NO. 89-7743

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

THADDEUS DONALD EDMONSON
Petitioner

versus

LEESVILLE CONCRETE CO.,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Brief of Amicus Curiae, Louisiana Association of Defense Counsel in support of Leesville Concrete Co., Respondent

STATEMENT OF INTEREST

Founded in 1963, the Louisiana Association of Defense Counsel (LADC) is a non-profit corporation with 1500 members who are engaged in civil litigation in state and federal courts. Although member attorneys handle some plaintiff matters, they are primarily defense-oriented and represent thousands of individual homeowners, car and truck drivers, non-profit institutions, and small business owners, as well as major corporations and insurance companies. Through legal seminars and newsletters, LADC promotes high professional standards among its members.

LADC's commitment to its clients and to the adversary system raises its interest in the resolution of the legal

issue before this Court.[1] LADC believes that application of the *Batson* Rule[2] to civil litigation will profoundly and detrimentally affect the adversary system by distorting the jury selection process. LADC further fears that the *Batson* Rule will result ultimately in the abolition of all peremptory challenges. For these reasons, LADC urges the affirmance of the opinion of the Fifth Circuit.

SUMMARY OF ARGUMENT

Congress enacted the Thirteenth, Fourteenth, and Fifteenth Amendments after the Civil War to outlaw slavery, protect the civil liberties of the newly emancipated citizens, and "abolish all badges and incidents of slavery in the United States."[3] Since that time, the courts have been involved in a dialogue with Congress and the citizens of the nation on the proper application of the civil rights principles to a multitude of situations that run throughout the fabric of public and private life. At issue now is whether racial justice requires application of the *Batson* Rule on peremptory challenges to civil litigation. This is not an easy issue, but historical, constitutional, and practical considerations weigh against mandating such a major modification in civil practice.

For more than 800 years, the peremptory challenge has been part of a cluster of procedures (random selection of the array, voir dire, challenge for cause, peremptory challenge) that insure the impartiality of the jury. Although the form of the peremptory strike varied

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1 This brief is submitted upon the written consent of all parties, copies of which are filed herewith.

2 *Batson v. Kentucky*, 476 U.S. 79 (1986).

3 *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

somewhat at each stage of its development, restrictions on its use were invariably counterbalanced by greater freedom in other parts of the cluster. Thus, in the civil trials of the 1600s and 1700s where two impartial "triors" had to approve a challenge "to the favor" (a challenge for which no objective proof could be given), the litigant had extreme liberty in voir dire and automatic challenges for cause. American jurisprudence shifted the balance somewhat, providing more judicial control of voir dire and challenges for cause and allowing complete discretion in the use of the peremptory challenge. The *Batson* Rule would disrupt the balance that has been struck through historical evolution without providing any compensating mechanisms.

The constitutional questions involved in this matter arise from the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, and the right to trial by jury, guaranteed by the Seventh Amendment. The Equal Protection Clause applies only to government conduct. LADC maintains that a private attorney who represents a private party in civil litigation and who performs an attorney's traditional function is not a state actor. Neither are the trial judges when they passively observe the peremptory challenges, for they neither grant nor deny the challenges but merely acquiesce in their use. To find state action in the use of peremptory strikes would constitutionalize all conduct by civil litigants.

Due Process requires a fair and impartial jury; it does not entitle litigants to a jury of any particular racial, social, or economic composition. The use of the peremptory challenge for so long to promote impartiality on the jury panel suggests, in fact, that due process might require the unimpaired right to exercise peremptory challenges. The *Batson* Rule would impair this right by creating different

burdens for similarly situated litigants, by preventing challenges to minority litigants who are themselves racially biased, by requiring objective evidence of subjective impressions, and by allowing complete denial of particular challenges. Due to the infinite variety of cognizable groups, *Batson* would be unworkable in the civil trial. Eventually, it could cause the complete abolition of peremptory challenges by legislative bodies concerned by the proliferation of *Batson*-style hearings based on gender, religion, ethnicity, and economic class.

ARGUMENT

Like the Petitioner, the Louisiana Association of Defense Counsel (LADC) deplores the sometimes tragic history of American race relations and recognizes the need to eliminate discriminatory practices — both overt and subconscious — from the courtrooms of the country. Thaddeus Donald Edmonson, plaintiff-petitioner, asks this Court to apply the *Batson* Rule to civil litigation and to require litigants to offer clear, specific, and racially neutral reasons for peremptory challenges directed to persons who belong to minority races. As Amicus Curiae, LADC respectfully maintains that the *Batson* Rule, while appropriate in the special context of criminal trials, would upset the balance of time-honored procedures that guarantee due process in civil trials, without reducing racism.

1. *THROUGHOUT THE HISTORICAL DEVELOPMENT OF THE JURY TRIAL, THE PEREMPTORY CHALLENGE SERVED TO GUARANTEE FAIRNESS AND IMPARTIALITY.*

The Supreme Court recognizes the continuous use of

peremptory challenges since the time of the early common law and the importance of the challenge in insuring due process of law:

> The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, . . . was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, . . . was recognized in an opinion by Justice Story to be part of the common law of the United States, . . . and has endured through two centuries in all the States, . . .The constitutional phrase "impartial jury" must surely take its content from this unbroken tradition.[4]

As the discussion below will show, the form of the peremptory challenge has varied according to the times and the context (civil or criminal). The impartiality of the jury was preserved not through a single procedure but by a cluster of related practices (random selection of the array, voir dire, challenge for cause, peremptory challenge). When one procedure underwent change, the others were adjusted to maintain the balance.

WILLIAM THE CONQUEROR, HENRY II, BRACTON

Group decision-making characterized English political life and contributed to the development of the common law jury trial.[5] William the Conqueror used jurors as sworn witnesses in the compilation of the Domesday Book and the examination of some criminal matters. Under Henry II (1154-1189), groups of carefully chosen men were

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4 *Holland v. Illinois*, 110 S.Ct. 803, 808 (1990) (citations omitted).

5 J.S. Cockburn & T.A. Green, *Twelve Good Men and True* 363 n. 6 (1988).

impaneled in each county to render verdicts in land disputes.[6] The jury also decided cases of trespass and contract. The use of the jury in private litigation influenced criminal trials, especially after 1215 when the Catholic Church abolished the ordeal as the accepted method of proof. In turn, the criminal jury affected the subsequent development of the civil jury.[7]

Early challenges may have contained elements of both the peremptory challenge and the challenge for cause. When a criminal defendant alleged malice on the part of a juror, the court accepted his declaration as conclusive.[8] Henri de Bracton (d. 1285) explained the rule of challenges in this way: "[I]f there is ground for suspicion, all are to be removed, that the inquiry may proceed free of all doubts."[9]

BLACKSTONE

In the Eighteenth Century, Blackstone explained that litigants in English trials were allowed "challenges to the array" (exceptions to the whole panel based on the partiality of the sheriff who summoned the jurors) and "challenges to the poll" (exceptions to the particular juror).

> In criminal cases, at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary species of challenge to a certain number of jurors, without showing any cause whatever,

6 Van Dyke, *Jury Selection* 2-5 (1977).

7 Cockburn & Green, *supra* note 5, at xvi, 3.

8 Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 163 (1989).

9 2 Of the Laws and Customs of England 405.

> which is termed a peremptory challenge. This is grounded on two reasons: (1) Sudden impressions and unaccountable prejudices are sometimes awakened by the mere looks and gestures of another, which might affect a prisoner as to a juryman, and render him reluctant to have his case tried before him. (2) Because, upon failure to establish a challenge for cause, the mere fact of challenging might awaken the resentment of a juror; and to prevent ill consequences therefrom, a prisoner is permitted to peremptorily challenge him.[10]

The jurisprudence allowed defendants unlimited challenges for cause and 35 peremptory challenges. After Parliament passed the Ordinance of Inquests in 1305, the Crown gave up peremptory challenges per se, but it replaced them with the practice of asking unacceptable jurors to "stand aside." The jurors who stood aside were called only if all other jurors were exhausted.[11]

The practice in civil trials was somewhat different. Litigants had greater leeway than in criminal trials to examine the jurors as to bias during voir dire.[12] Jurors could be challenged for suspicion of bias or partiality. "Principal challenges" (challenges for cause) "carr[ied] with them *prima facie* evident marks of suspicion, either of malice or favor."[13] They were automatically granted and could not

10 W. Blackstone, 4 *Commentaries* 907 (Gavin ed. 1941).

11 Alschuler, *supra* note 8, at 166 n. 53; *Holland v. Illiniois*, 110 S.Ct. at 808 n.1.

12 Gutman, *The Attorney-Conducted Voir Dire of Jurors*, 39 Brooklyn L. Rev. 290, 293-94 (1972).

13 W. Blackstone, 3 *Commentaries* 678 (Gavin ed. 1941).

be overruled. The litigants could also make "challenges to the favor." If the opposing party questioned the challenges, the matter was decided by the other jurors or by two "triors."

> Challenges to the favor are where the party has no principal challenge, but objects only from some probable circumstance of suspicion, as acquaintance and the like; the validity of which must be left to the determination of triors, whose office is to decide whether the juror be favorable or unfavorable.[14]

Thus, it is not true that there were no peremptory challenges in English civil trials, but they were handled differently — somewhat like a *Batson* peremptory without the recial considerations. At the same time, it is important to realize that the restricted peremptory challenge was counterbalanced by unfettered voir dire and by unassailable challenges for cause.

THE UNITED STATES

When the jury trial came to the American colonies, the concept of the peremptory challenge was firmly attached. Indeed, one of the factors leading to the American Revolution was the Crown's tendency to seek biased jurors in political trials and to deny defendants an opportunity to discover biases through voir dire.[15] The memory of oppressive court practices influenced the debates surrounding the establishment of the American government. During debates on the Amendments to the Constitution, James

14 *Id.* at 679.

15 Gutman, *supra* note 12, at 294.

Madison explained:

> Where a technical word was used [trial by jury], all incidents belonging to it necessarily attended it. The right to challenge is incident to the trial by jury, and therefore, as one is secured, so is the other.[16]

Thus, while the right to a jury trial is preserved in general terms in the Sixth and Seventh Amendments, the First Congress of the United States reaffirmed the common law right of peremptory challenges.[17]

Since constitutional times every, court decision has affirmed the importance of peremptory challenges. "While the Constitution does not confer a right to peremptory challenges, these challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury."[18] American legislators and jurists unequivocally incorporated this right in civil litigation. "The denial or substantial impairment of the statutory right of peremptory challenge is prejudicial to the constitutional right to a fair and impartial jury."[19]

The Federal Jury Selection and Service Act of 1968[20] was enacted to overcome prejudicial jury selection practices such as the "key man" system and the imposition of special qualifications upon the jurors. Even while commanding the federal courts to select jurors at random from

16 *Id.* 296-97.

17 Act of April 30, 1770, ch. 9 sect. 30, 1 Stat. 119.

18 *Batson*, 476 U.S. at 84.

19 *Photostat Corp v. Ball*, 338 F.2d 783. 786 (10th Cir. 1964). *See also Kiernan v. Van Schaik*, 347 F.2d 775 (3rd Cir. 1965).

20 28 U.S.C. 1861 *et seq.*

voter registration lists, the House Committee emphasized that the new selection process did not alter in any way the right of litigants to exercise peremptory challenges.

> The act guarantees only that the jury shall be "selected at random from a fair cross section of the community." It does not require that at any stage beyond the initial source list the selection process shall produce groups that accurately mirror community makeup . . . In paraticular, the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.[21]

The peremptory challenge and the trial by jury have evolved together throughout the centuries. The peremptory challenge is an integral part of the trial by jury. Denial or alteration of that right profoundly alters the trial and thus compromises due process.

2. *WHILE SPECIAL CIRCUMSTANCES JUSTIFY THE BATSON RULE IN CRIMINAL TRIALS, IT SHOULD NOT BE EXTENDED TO CIVIL LITIGATION*

While invoking *Batson* as a precedent for requiring a racially neutral explanation for the exercise of peremptory strikes, the Petitioner has failed to examine some important differences which provide an underlying rationale for the *Batson* decision.

The prosecutor has a built-in advantage over the defendant and the civil litigant in that 25 to 30 per cent of the members of the state jury pools believe

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21 1968 U.S. Code Cong. & Ad. News 1792, 1794-95.

that a defendant is probably guilty once indicted.[22] Additionally, public fear of crime committed by minority persons can approach irrational levels, as indicated by the Willie Horton affair or the case of Charles Stuart, the Boston man who claimed he and his pregnant wife were shot by a black youth from a nearby housing project. No such irrational fear operates in the context of the civil trial.

The number of peremptory challenges in a criminal trial offers less incentive to a prosecutor to pick and choose as carefully as a civil litigant. At the federal level, the prosecutor has 20 challenges in capital cases, 6 in felonies, and 3 for offenses punishable by imprisonment of one year or less.[23] The civil litigant, on the other hand, has only three peremptory strikes. Thus the civil challenge system "contains an internal sanction against abuse: the party who insists on challenging jurors on the basis of questionable stereotypes increases his chances of removing friendly jurors and decreases his opportunities for excluding more biased veniremen."[24]

The prosecutor's duty as a state representative is to insure that the accused is tried by an impartial jury, not to impanel a jury composed of individuals more likely to convict. "The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The prosecutor must recall that he occupies a dual role. . . [1] to furnish that

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22 Comment, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. Pitt. L. Rev. 673, 700 (1983) (citing *Hearing Before the Subcommittee On Criminal Justice*, 95th Cong., 1st Sess. 6, at 254).

23 Fed. R. Crim. P. 24(b).

24 Salzburg & Powers, *Peremptory Challenges and the Clash between Imparatiality and Group Representation*, 41 Md. L. Rev. 337 (1982).

adversary element essential to the informed decision of any controversy . . . [and 2] [to accomplish] impartial justice."[25]

The prosecutor has no Sixth Amendment right to a fair trial since he has no personal stake in the outcome. Unlike the civil litigant, the prosecutor is clearly a state actor.

3. *AN EQUAL PROTECTION ANALYSIS SHOULD NOT BE APPLIED TO PEREMPTORY CHALLENGES IN CIVIL LITIGATION BECAUSE A FINDING OF "STATE ACTION" WOULD CONSTITUTIONALIZE ALL CONDUCT BY CIVIL LITIGANTS.*

The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Although the Fifth Amendment contains no equal protection clause, the Supreme Court held that such discrimination by the Federal Government is a violation of "due process of law."[26] Both amendments apply only to government entities and government action. The Equal Protection Clause "prohibits discriminatory action by the State but erects no shield against private conduct however discriminatorial or wrongful."[27]

One of the primary purposes of the State Action Doctrine is to preserve individual freedom. "Careful adherence to the 'State action' requirement preserves an area of individual freedom by limiting the reach of Federal law and

25 *Professional Responsibility*, 44 **A.B.A.J.** 1159, 1218 (1958).

26 *Bolling v. Sharpe*, 347 U.S. 497 (1954).

27 *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Federal judicial power. It also avoids imposing on the State, its agents, or officials, responsibility for conduct, for which they cannot fairly be blamed."[28]

It is only when private conduct becomes significantly involved with government officials that equal protection considerations are implicated. In some cases, state action is clear. In others, the involvement of private and public parties may not give rise to State action. "[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an impossible task which this Court has never attempted. Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."[29] The Supreme Court has, however, provided certain guidelines: (1) the Public Function Test, (2) the State Compulsion Test, (3) the Nexus Test, and (4) the Joint Action Test.[30]

The Public Function Test is satisfied when a private person engages in activities that are traditionally associated with governmental entities. Thus, white political parties that fixed voting qualifications and ran primary elections were subject to constitutional limitations.[31] In contrast, the exercise of peremptory challenges is not a public function. Since the earliest history of the common law and throughout the 200-year history of the United States, the *litigants* have enjoyed this right. "[T]he Court is the judge of actual biases, but counsel is the sole and exclusive judge of whom he shall

28 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

29 *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) (citations omitted).

30 Lugar, 457 U.S. at 939.

31 *Smith v. Allright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

challenge for suspected biases or prejudice his client's cause."[32]

The State Compulsion Test is applied when legislation, public officials, or courts require or encourage an unconstitutional practice by private persons. The Supreme Court found state action when state laws provided for racially segregated restaurants[33] and when white property owners sought a court order to enforce racially discriminatory convenants.[34] Neither the peremptory challenge statute[35] nor the judge in any courtroom can be said to require or encourage racial discrimination on the part of private litigants.

The Nexus Test arises when private persons and government bodies have multiple contacts or entanglement with each other. The Court found state action in *Burton v. Wilmington Park Authority,*[36] where a restaurant excluding blacks had a symbiotic relationship with a government board. The government built a parking facility with public funds and leased space to the restaurant. Rental payments by the restaurant helped pay for the facility. The restaurant owners enjoyed tax-exempt status when they made improvements to their space. The government benefitted from the convenience for its employees as well as from increased use of parking facilities. The Court held that the "State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise."[37] On the other hand, the

32 *Photostat Corp. v. Ball,* 338 F.2d 783 (10th Cir. 1964).

33 *Peterson v. City of Greenville,* 373 U.S. 244 (1963).

34 *Shelly v. Kraemer,* 334 U.S. 1 (1948).

35 28 U.S.C. 1870.

36 365 U.S. 715 (1961).

37 Discussed in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 358 (1974).

Supreme Court held that there was no state action in *Jackson v. Metropolitan Edison Co.*[38] despite government licensing, regulation, and authorization of termination procedures of a privately owned utility.

While peremptory challenges occur in a courthouse, which is a public building, it cannot be said that the federal judge insinuates himself into a position of interdependence with the private attorneys. Instead, the justice system requires complete independence on the part of each attorney and the judge. Since the litigants have traditionally exercised peremptory challenges with complete discretion, this conduct cannot fairly be attributed to the judge.

In *Lugar v. Edmondson Oil Company,* [39] the Supreme Court used a two-pronged Joint Action Test to determine whether the deprivation of a federal right could be fairly atttributable to the State. First, the deprivation must be caused by the exercise of a privilege created by the state. Secondly, the person who has caused the deprivation must be either a state official or someone who has obtained significant aid from state officials. The *Lugar* Court found state action in the prejudgment attachment of property because (1) the creditor had relied on a state sequestration statute and (2) the creditor received significant assistance from the judge who signed and the sheriff who executed the writ of attachment. In the matter at bar, the issue is whether the judge renders significant aid to private litigants when he allows them to exercise a right that has been theirs since the common law development of trial by jury. Put another way, is the judge overtly and actively involved in this dismissal or does he merely acquiesce in a decision made by a private party in an area where the

38 419 U.S. 345 (1974).

39 547 U.S. 922 (1982).

statutes and jurisprudence allow unfettered discretion?[40]

Not every judicial proceeding will involve overt significant aid or give rise to state action. "[M]erely resorting to the courts and being on the winning side of a lawsuit does not make a party a . . . joint actor with the judge."[41] For example, a public defender employed by the State filed a Motion to Withdraw as Counsel and a trial court granted the motion. It was within the discretion of the trial court to deny the motion. The Supreme Court found that "[A] public defender does not act under color of state law when performing a lawyer's traditional function as counsel."[42]

Private attorneys representing private parties in civil actions are not state actors. Because the involvement of the judge in the exercise of the peremptory challenge is minimal and satisfies none of the tests discussed above, LADC urges the Court to find no state action. Further, LADC suggests respectfully that a finding of state action would have far-reaching and unintended ramificatiions, tending to constitutionalize all courtroom activity by civil litigants. For example, it could lead to the demand that the *Brady* Rule[43] apply to civil litigants or create potential 1983 Actions[44] from every case.

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40 *See Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340 (1988) and *Blum v. Yaretsky*, 457 U.S. 991 (1982).

41 *Dennis v. Sparks*, 449 U.S. 24, 28 (1980).

42 *Polk County v. Dodson*, 454 U.S. 312 (1981); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) held that "under color of state law" and "state action" are the same thing.

43 *Brady v. Maryland*, 373 U.S. 83 (1963).

44 42 U.S.C. 1983.

4. *THE SEVENTH AMENDMENT DOES NOT REQUIRE A REPRESENTATIVE CROSS SECTION ON THE JURY PANEL.*

Adopting a Sixth Amendment argument and applying it by analogy to the Seventh Amendment right to juries in civil trials, Petitioner maintains that he lost "his fair possibility for obtaining a representative cross-section of the community" when Respondent used two peremptory challenges to strike African-Americans from the panel. The Supreme Court has rejected the idea that the cross-section requirement applies to the petit jury.

> We reject petitioner's fundamental thesis that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the "fair possibility" of a representative jury. While statements in our prior cases have alluded to such a "fair possibility" requirement, satisfying it has not been held to require anything beyond the inclusion of all cognizable groups in the venire.[45]

The Court explained that the fair cross section rule for the venire was a "means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)."[46] The Court further reasoned that such a requirement would "undermine rather than further the constitutional guarantee of an impartial jury" by "crippl[ing] the device of peremptory challenge."[47] Other

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45 *Holland v. Illinois*, 110 S.Ct. at 806.

46 *Id.* at 807.

47 *Id.* at 806, 809.

Supreme Court opinions have emphasized that a representative cross section requirement would be "unsound and unworkable"[48] and that litigants are "not entitled to a jury of any particular composition."[49]

5. *THE PEREMPTORY CHALLENGE FUNCTIONS WITHIN THE ADVERSARY SYSTEM TO PROMOTE IMPARTIALITY ON THE JURY.*

In both criminal and civil cases, the purpose of the jury is to assure a fair and equitable determination of the factual issues. The selection of impartial jurors is achieved through the use of three complementary procedures: (1) random selection of the venire, (2) challenge for cause, and (3) peremptory challenge.[50]

The random selection of potential jurors from representative lists of citizens insures a cross section of the community; however, it does not exclude jurors who are biased. Challenges for cause begin the process of excluding biased jurors, but many biased jurors slip through the net because of the narrow grounds for challenge, the court-conducted voir dire, and the reluctance of jurors to admit their prejudice.[51]

> Most jurors are like most people: They tell you what you want to hear. . . . .
>
> If a juror informs you that her mother was killed in a car accident, that same juror may nevertheless say she can be fair and impartial to the defendant. . . . Get her off the jury. The best way

48 *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986).

49 *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

50 Salzburg & Powers, *supra* note 24.

51 *Id.* at 340.

> is to have her admit her underlying resentment. . . . But don't push. If there is resistance, [u]se a peremptory challenge. That is what they are there for. . . .
>
> If you see the juror's face stiffen and through clenched teeth he says he can be fair, don't ask "Are you prejudiced against Arabs?" His answer will be no. The bigot — and all the other jurors — will resent the question, because no one in this country believes he is prejudiced against anyone or anything. Everyone is always fair. To say that someone cannot be fair is to say that someone cannot be an American and does not believe in democracy.[52]

The peremptory challenge gives litigants a finer net to remove those people whom the litigants suspect of unconscious, concealed, or unprovable bias.

While some commentators deprecate "hunches," expert trial advocates continue to rely on them:

> Trust your instincts. If your jury survey tells you that a young, married woman is the perfect juror for your case, but there is something that you do not like about the person who meets that description kick her off. Use your common sense, that is what you are being paid for — to evaluate and communicate. Everything about the guy — his name, his age, his sex, his race, his religion— says yes, but there is something about him that you cannot figure out, excuse him.[53]

The American legal system is adversarial; it assumes

52 Nolan, *Jury Selection*, 16 **Litigation** 24, 24 and 26 (Spring 1990).

53 *Id.*

that justice can best be achieved when lawyers zealously represent the individual interests of their clients. As advocates, lawyers try to select a jury that will be fair, that will be favorably disposed to them, their clients, and their cases, and that will return a favorable verdict. The opponents, of course, are also looking for a favorable jury. "When two evenly matched adversaries participate in the jury selection process, injecting their concepts of a good jury into that process, they will ultimately select a jury that will fairly and impartially hear the evidence and reach a just verdict."[54]

By enabling each side to exclude those jurors it believes will be most partial toward the other side, peremptory challenges remove extremes of opinion and partiality.[55] Peremptory challenges are "hedges against an unlucky roll of the jury wheel."[56] They allow attorneys to remove people who seem erratic, anti-social, or incapable of understanding the issues. On many occasions, plaintiffs and defendants may agree on the unsuitability of certain candidates for the panel. At other times, the very jurors that one side wants the most will be the ones challenged by the adversary. Both sides instinctively recognize a *je ne sais quoi*, indicating that the jurors are predisposed to favor a litigant. The petitioner misunderstands the function of peremptory challenge, when he complains that his opponent removed two "members of Edmonson's race, who may have otherwise been anticipated to be *predisposed* towards Edmonson's position."[57] In the name of fairness,

54 T. Mauet, *Fundamentals of Trial Techniques* 31 (1980).

55 *Holland v. Illinois*, 110 S.Ct. at 809.

56 Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 **Sup. Ct. Rev.** 145.

57 Petition for Writ of Certiorari, p. 7 (emphasis supplied).

the petitioner would have his opponent compete in the adversary system with one hand tied behind his back.

The peremptory challenge is not a superstitious vestige of medieval practices. The Supreme Court has said, "The right is a traditional, arbitrary and capricious one and it must be exercised with full freedom or it fails of purpose."[58] The denial or impairment of the right of peremptory challenge is reversible error. A trial court may not refuse to let a litigant reserve a challenge to exercise against replacement members of a panel.[59] A court may not prevent the intelligent use of peremptory challenges by unfairly restricting voir dire.[60] A new trial may even be required if a judge improperly denies a challenge for cause and thereby compels the unnecessary use of a peremptory challenge.[61]

6. *APPLICATION OF THE BATSON RULE TO CIVIL LITIGANTS WOULD SIGNIFICANTLY IMPAIR THE RIGHT OF PEREMPTORY CHALLENGES AND CAUSE SIMILARLY SITUATED LITIGANTS TO BE TREATED DIFFERENTLY.*

Application of the *Batson* Rule to civil trials would impair the right to exercise peremptory challenges in various ways: (1) it prevents challenges to minority persons who are themselves racially prejudiced; (2) it requires the marshalling of evidence in a situation where it is difficult or impossible to obtain; (3) it creates different burdens

58 *Lewis v. United States*, 146 U.S. 370, 378 (1892).

59 *Carr v. Watts*, 597 F.2df 830, 832 (2d Cir. 1979).

60 *Kiernan v. Van Schaik*, 347 F.2d 775 (3rd. Cir. 1975).

61 *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977).

for similarly situated litigants; and (4) it provides that peremptory challenges may be denied by the court.

It is wrong to assume that no black person or other minority citizen can be fair to members of the majority race. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State case against a black defendant."[62] However, it is also wrong to assume that a particular person would be incapable of bias. In fact, one white person on Edmonson's panel of prospective jurors openly expressed racial hostility and was excluded for cause. Even if he had said nothing, as is the case with most jurors, he was unfit for jury duty and should have been excluded through use of a peremptory challenge. Similarly, a small number of black jurors could be hostile to white litigants or predisposed to favor people who share their race.

Even assuming *arguendo* that a court would allow civil litigants to assert that a particular juror would be racially biased, they would be obliged to provide some objective exidence of this belief. Although *Batson* provides that the "explanation need not rise to the level justifying exercise of a challenge for cause,"[63] the burden still places the attorneys at a disadvantage. If they could prove bias, they could make a challenge for cause. They must try to find objective evidence of subjective impressions. If the explanation is not accepted by the trial court, a biased person may remain on the panel.

Meanwhile, the opposing attorney may issue

62 *Batson*, 476 U.S. at 39.

63 Id.

challenges with absolutely no explanation, and all of them will be granted. The *Batson* Rule creates two kinds of peremptory challenge and two classes of challengers, producing inconsistencies and unfairness rather than equal protection of the law.

7. *APPLICATIION AS WRITTEN OF THE BATSON CRITERIA TO CIVIL LITIGATION WILL RESULT IN THE ELIMINATION OF THE PEREMPTORY STRIKE IN CIVIL CASES, A RESULT NOT JUSTIFIED FROM A POLICY STANDPOINT AND A RESULT NOT INTENDED BY THE BATSON MAJORITY.*

Preamble

The majority in *Batson* did not intend to eliminate the peremptory strike in those cases to which *Batson* applied. LADC deduces the intent to preserve the peremptory challenge from the fact that there was a strong concurring opinion by one member of the Court in whose view the peremptory strike could not be justified on constitutional grounds. Moreover, LADC maintains that the peremptory strike has a position in American trials protected by years of custom and use.

No showing has been made by the Petitioner which would justify the total emasculation of the peremptory strike which would result from the enforcement of the rule of the *Batson* case in the civil trial system in the United States.

Further, *Batson* was decided by this Court on an Equal Protection ground, not on a Sixth Amendment "Right to Trial by Jury" ground. The linch-pin of an Equal Protection challenge is the finding that state action is

involved. The action of the prosecutor in a criminal trial is clearly the action of the state. The prosecutor is a state employee performing a state function at the time this allegedly discriminatory exercise of peremptory strikes occurs.

The opinion of the Fifth Circuit in the case at bar effectively demonstrates that the action of an attorney for a private litigant, be that litigant plaintiff or defendant, cannot be "state action" in the sense that the term is used in the *Batson* opinion. The same is true as to the judge who passively reacts to the peremptory challenge exercised by the attorney for the civil litigant. The LADC brief hereinabove also demonstrates these points.

Put another way, if this Court is of a mind to hold that the action of a private litigant or his attorney constitutes state action, then Respondent and LADC have lost this case. By the same token, if this Court is convinced that the action of an advocate for a civil litigant is not a "state action," the *Batson* Rule cannot apply under the precise terms of the *Batson* case. Petitioner will have to search for a different legal ground on which to premise his case. However, the courts have held that the Sixth (in criminal cases) and the Seventh (in civil cases) Amendments do not require a petit jury which is racially or otherwise balanced. For lack of legal grounds to invoke the *Batson* rule in civil cases, the Supreme Court should affirm the holdings of the courts below.

Batson is Unworkable in the Civil Context

Whatever the vehicle for its enforcement in civil trials, the *Batson* rule would create enormous practical difficulties, resulting in the emasculation or outright elimination of the peremptory strike in civil litigation.

The rule of *Batson* is that a lawyer exercising a peremptory strike must exercise it in a racially nondiscriminatory manner. In order to set in motion the determination that a strike is improper under this rule, the defendant[64] must show that he is a member of a "cognizable racial group." He must also show tht the prosecutor has peremptorily struck venire members who are of the defendant's race.

Upon the lodging of the charge that there has been a violation of the *Batson* Rule, the court, considering the above facts and other relevant circumstances, must determine that there has been a violation. If it makes this determination, the prosecutor must come forward with a race-neutral explanation for the strikes, failing which, the strikes will be voided. The explanation has to be more than a general assertion of counsel's good faith (the acceptance of which would render the whole procedure a "vain and illusory requirement"[65]) Failure satisfactorily to explain the strikes would result in their being voided.

As already mentioned, the *Batson* Rule applies only to the prosecutor. It can be no other way because the "state" whom the prosecutor represents has no race, creed, or color which can be subject to the *Batson* requirement. Thus, *Batson* according to its terms, applies only to the defendants's objection to the prosecutor's strikes simply because, logically, it can be no other way.

The *Batson* Rule is workable in a criminal context. It is not workable in a civil context. This fact should be plain,

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64 *Batson* was a criminal case. The rule applicable to the prosecutor would not apply to the attorney for the defendant. The *Batson* opinion does not say that it does, and logically it cannot. *See infra.*

65 *Batson*, 476 U.S. at 98 (citation omitted).

but if it is not, it is demonstrable by a very simple hypothetical situation. Suppose there is a jury trial with a black plaintiff and a white defendant. With no difficulty, each party can show that he is a member of a cognizable racial group and, therefore, entitled to *Batson* protection if it applies in civil litigation. When the judge calls upon the black female plaintiff, for example, to justify her strikes, he may be told that a certain juror was challenged because he was a management-level white male who belonged to a fundamentalist sect and who seemed critical of women, blacks, and people who bring lawsuits. The judge must determine, then, what percentage of the strike was based upon racial considerations and whether the strike would be permissible under the *Batson* Rule. The white defendant may give similar reasons. This administrative nightmare would be increased by the addition of more "sides" and more lawyers.

The unworkability would then be geometrically aggravated if the requirement of *Batson* were applied to the ubiquitous "clone rule." Almost all civil trial lawyers seek to avoid having on the jury persons who are "clones" of the opponent; i.e., persons who are alike in age, habitus, family, income, occupation, religion, race, etc. Rather than allow trial courts to be overwhelmed by *Batson*-style hearings based on gender, age, and other clone-factors, Congress and the state legislatures would be called upon to abolish peremptory challenges completely. The Supreme Court would then be considering the issue of whether a trial without peremptory strikes is constitutional.

Another point must be made. Lawyers who follow the clone rule consider a wide range of factors. Having only three peremptory strikes, they cannot assume automatically that all black jurors will favor a black litigant. Thus, race usually plays an insignificant part in the equation. Judges who allow thorough and probing voir dire further reduce

the chance of stereotypical characterizations by causing each juror to appear as an individual.[66]

Selective Peremptory Challenges Do Not Stigmatize the Jurors

The Petitioner claims that racial discrimination in the exercise of peremptory challenges harms the litigant, the excluded juror, and society. The blanket exclusion of all black jurors would support Petitioner's argument; selective challenge does not. No individual has a right to hear any particular trial; no litigant has a right to have his case heard by a particular juror. In every trial, a certain number of people will by excluded by peremptory strikes. They may be disappointed; they may even feel bad because someone "did not want them." However, if the judge explains the operation of the system to them properly, they will understand that they are not being insulted or stigmatized. Each litigant tries to obtain the most favorable jurors possible. If exclusion in and of itself is stigmatizing, then no one— whether blue collar worker, college graduate, accident victim, housewife,or manager-type— should be subjected to the practice. The 800-year experience of English and American courts belies any such conclusion.

CONCLUSION

Race as the principal motivation for the exercise of the peremptory strike is wrong. It is morally wrong whenever it is the principal motivation of a peremptory strike, whether that strike is in a criminal or civil case. It is legally wrong when it is made the subject of state action.

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66 *See* Singer + Singer, *Voir Dire By Two Lawyers: An Essential Safeguard*, 57 **Judicature** 386 (1974); Comment, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 **Harv. C.-R.C.L. L. Rev.** 227 (1986).

It is neither morally nor legally wrong when it is an *incidental* part of the decision to exercise a peremptory strike.

The *Batson* Rule, carefully crafted to promote justice in the criminal trial, should not apply in the very different context of the civil trial. The prosecutor is clearly a state actor. The prosecutor has no liberty or property interest in the outcome of the trial; thus, he does not have the same claim to due process as the defendant or the private litigant. The private litigant enjoys no built-in prejudice in his favor as does the prosecutor. The private litigant has only three peremptory strikes and cannot afford to use them unless he feels the potential jurors are truly biased or predisposed to favor his opponent.

In contemporary American society, the litigant must consider a number of factors when trying to impanel a jury that will be favorable to him. His opponent, under the rules of the adversary system, will do the same. The *Batson* Rule would impair this process by requiring objective explanations for subjective impressions. If the *Batson* Rule were applied only to race, it would create two types of peremptory challenges and two classes of challengers. Due process requires that all litigants exercise their challenges in a similar manner. However, if all litigants were allowed to invoke the rule on the basis of other cognizable groupings, chaos would result. Rather than allow the courts to be buried in an avalanche of *Batson*-style hearings, the legislative bodies of the nation would seek to abolish the right of the peremptory challenge completely.

LADC urges the Supreme Court to preserve this historic and statutory right without distortion. LADC urges this Court to affirm the well-reasoned opinion of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*.

Respectfully submitted,

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No. 89-7743

In The

Supreme Court of the United States

October Term 1990

THADDEUS DONALD EDMONSON

Petitioner,

versus

LEESVILLE CONCRETE COMPANY, INC.

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Defense Research Institute ("DRI") is the largest national organization of lawyers specializing in the defense of civil litigation. DRI has over 17,000 individual lawyer members and is connected to most defense law firms in the United States through its relation to the International Association of Defense Counsel, the Federation of Insurance and Corporate Counsel, the Association of Defense Trial Attorneys and sixty state and local defense lawyer organizations. DRI's members represent clients in countless tort-related cases in every jurisdiction. As trial advocates, they frequently face the task of jury selection. DRI's members have viewed their participation in the jury selection process by use of a reasonable number of peremptory challenges as a legitimate tool in assuring a fair hearing of the defendant's case. DRI and its members share a common interest in the fairness and neutrality of the jury system, as well as its efficiency.

SUMMARY OF ARGUMENT

The Defense Research Institute ("DRI") submits this brief as Amicus Curiae to urge this Honorable Court to affirm the decision of the U.S. Court of Appeals, Fifth Circuit, sitting *en banc* (reported at 895 F.2d 218). The court below correctly held that the decision of this Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) does not apply to the exercise of peremptory challenges by a private attorney representing a private client in a civil case. DRI respectfully maintains that this holding is correct in that (1) the decision is

consistent with the nature, purpose and history of the peremptory challenge in jury trial cases, (2) government action is absent when an attorney representing a private party in civil litigation between private parties exercises peremptory challenges, and (3) the rationale for the *Batson* holding is absent in civil litigation between private parties; specifically, (a) the role of the private attorney is distinct from that of the criminal prosecutor, (b) there is no danger of the private attorney effecting the deliberate and systematic exclusion of any group of citizens from serving as jurors, and (c) there is no "right" conferred by law which requires application of the *Batson* holding to this case.

ARGUMENT

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE NATURE, PURPOSE AND HISTORY OF THE PEREMPTORY CHALLENGE IN JURY TRIAL CASES.

The peremptory challenge, as part of the jury selection process, "has very old credentials." *Swain v. Alabama*, 380 U.S. 202, 212, 85 S. Ct. 824, 831, 13 L.Ed.2d 421 (1965). Such challenges are rooted in very early English common law, and the "right of challenge was a privilege highly esteemed, and anxiously guarded . . . " *Id.* at 212-214 and n.13 citing *United States v. Johns*, 4 U.S. 412, 1 L.Ed. 888 (Cir. Ct. Pa. 1806). Much has been written on the historical importance of the peremptory challenge in the jury

trial system.[1] This Court has given recognition and deference to the long history and tradition of the peremptory challenge as a part of trial by jury. *Swain*, 380 U.S. at 212-220, 85 S. Ct. at 831-836. The Court has specifically acknowledged that peremptory challenges "traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson v. Kentucky*, 476 U.S. 79, 91, 106 S. Ct. 1712, 1720, 90 L.Ed.2d 69 (1986), citing *Swain*, 380 U.S. at 219.

Since their introduction into the jury trial system, it has been axiomatic that peremptory challenges are not subject to judicial inquiry. By its nature, the challenge is "one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U.S. at 220, 85 S. Ct. 836. It has been suggested that there are four basic rationales for the peremptory challenge, specifically, (1) it facilitates the removal of those potential jurors whom a party may suspect to be biased, but who have not been shown to have any bias that would rise to a challenge for cause, (2) it eliminates jurors who may have been antagonized during voir dire by the attorneys' attempts to ascertain actual bias, (3) it avoids "trafficking in the core of truth in most common stereotypes," and (4) it plays a role in legitimizing the jury trial process by demonstrating that the jury is that of the

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[1] *See, e.g.*, Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*, 145-51 (1977); Mintz, *Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 Cornell L. Rev. 1026, 1039-41 (1987).

litigants' choice.[2] As this Court described the purpose of the peremptory challenge:

> The function of the challenge is not only to eliminate extremities of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide it on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' "

Swain, 380 U.S. at 219, 85 S. Ct. at 835, quoting, in part, *In Re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955). The Court has also: acknowledged that the challenge is "deemed an effective means of obtaining more impartial and better qualified jurors"; alluded to the "long and widely held belief that peremptory challenge is a necessary part of trial by jury" and "one of the most important of the rights secured to the accused; and further, noted its usefulness in "removing the fear of incurring a juror's hostility through examination and challenge for cause." *Id.* at 218-220. The *Batson* majority expressly rejected a suggestion in a concurring opinion "that this historic practice, which long has served the selection of an impartial jury, should be abolished." 476 U.S. at 99 n.22. More recently, in *Holland v. Illinois*, ___ U.S. ___, 110 S. Ct. 803, 808, 107 L.Ed.2d 905 (1990), this

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[2] Hopper, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?* 74 Va. L. Rev. 811 at n.2 (1988) quoting in part, Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 553 (1975).

Court reiterated the value of peremptory challenges, stating:

> One could plausibly argue (though we have said the contrary [citation omitted]) that the requirement of an "impartial jury" impliedly *compels* peremptory challenges, but in no way could it be interpreted directly or indirectly to prohibit them. (Emphasis in original.)

This is, by no means, to attribute a constitutional dimension to the right to exercise a peremptory challenge: "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges . . . " *Stilson v. United States*, 250 U.S. 583, 586, 40 S. Ct. 28, 30, 63 L.Ed. 1154 (1919). Nonetheless, Congress has seen fit to provide, by statute, that "[i]n civil cases, each party *shall be entitled* to three peremptory challenges." 28 U.S.C. § 1870 (emphasis supplied). Absent a constitutional violation in the operation of that statute, specifically, the use of the challenge by a governmental actor in a manner which violates the guarantee of equal protection under the law, the peremptory challenge is a litigant's right, afforded by Congress in a jury trial. Absent such a violation, the courts are not empowered to mutate the peremptory challenge into "a strange procedural creature . . . a challenge for semi-cause." *Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308, 1317 (1988) (Panel opinion, Gee, J., dissenting).

II. GOVERNMENT ACTION IS ABSENT WHEN AN ATTORNEY REPRESENTING A PRIVATE PARTY IN CIVIL LITIGATION BETWEEN PRIVATE PARTIES EXERCISES PEREMPTORY CHALLENGES.

Under the Fifth and Fourteenth Amendments to the Constitution, the federal government may not constitutionally deny any person the equal protection of the law. *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 (1954). In order to invoke this constitutional guarantee, conduct which can be "fairly characterized" as "state" (government) action must be present. *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 924, 102 S. Ct. 2744, 2747, 73 L.Ed.2d 432 (1982). It is well settled that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948). DRI submits that government action is absent when an attorney representing a private party in civil litigation between private parties exercises peremptory challenges.

Petitioner contends that, in the instant case, state action is not required "in any classic sense," but fails to provide explanation or authority for this proposition. Government action as a prerequisite to an application of the equal protection guarantee is so interwoven in the fabric of this Court's decisions as to be irrefutable.[3] It is a sensible limitation which prevents private parties from

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[3] *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948), wherein Chief Justice Vinson refers to this requirement as one "embedded in our constitutional law."

facing "constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S, at 937, 102 S. Ct. at 2754.

Petitioner further contends that the trial judge is a government actor based upon his supervisory authority in connection with the trial proceedings. DRI submits that the trial judge's role in connection with private counsel's exercise of peremptory challenges in a civil case falls far short of that required to conclude that government action has been taken. In considering the nature of conduct which can be fairly attributable to the state, this Court's decisions have consistently focused upon the *decision* to discriminate as one ascribable to the government. *See, e.g., Lugar*, 457 U.S. at 938, 102 S. Ct. at 2754; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-177, 92 S. Ct. 1965, 1973, 32 L.Ed.2d 627 (1972). In *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005, 102 S. Ct. 2777, 2786, 73 L.Ed.2d 534 (1982), the Court explicitly pronounced considerations which provide particular guidance in the instant case:

> . . . [A] State normally can be held responsible for a *private decision* only when it has exercised *coercive power* or has provided such *significant encouragement* either overt or covert, that the choice *must in law be deemed to be that of the State* [citation omitted]. Mere *approval of* or *acquiescence in* the initiatives of a private party is *not sufficient* to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment [citation omitted].

(Emphasis supplied.) The foregoing principles go to the very heart of the matter presently before the Court. Indeed, the above-quoted words could have been written

specifically for the instant case. It is clear that the trial judge's actions in excusing a juror following counsel's exercise of a peremptory challenge amounts, *at most*, to acquiescence in *counsel's* decision. However, the judge's actions are, more accurately, an *acknowledgement* of counsel's right to exercise those challenges as he deems fit.

Petitioner's reliance on *Shelley*[4] and *Burton*[5] is misplaced. In *Shelley*, the Court held that judicial enforcement of private racial covenants constituted state action under the Fourteenth Amendment. The holding was based upon the *purposeful* exertion of state power, exercised by the judiciary, to deny individuals the equal protection of the laws. The holding is specifically focused upon a governmental *decision* resulting in the denial of substantive constitutional rights, i.e., the enjoyment of property, in a discriminatory fashion:

> States have made available the full *coercive power* of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and in which the guarantors are willing to sell.

334 U.S. at 19, 68 S. Ct. at 845 (emphasis supplied). By contrast, in connection with a private attorney's exercise of peremptory challenges on behalf of his private client, the Court is not called upon to exercise its discretion, to make any decision, or to act as an agent for enforcement

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[4] 334 U.S. 1, 68 S. Ct. 836.

[5] *Burton v. Wilmington Parking Authority*, 365 U.S. 706, 81 S. Ct. 856, 6 L.Ed.2d 45 (1961).

of a private decision which would deprive any person of his constitutional rights. The Court does not *act* at all in these instances, much less act purposefully, but merely takes note of the exercise of the private litigant's procedural right. To conclude otherwise would necessarily imply that a party is *entitled* substantively to a jury containing members of his own race, or to a jury with proportional representation by members of his race. It is well settled that he is not.[6]

The point of the *Shelley* decision was brought to the forefront in *Reitman v. Mulkey*, 387 U.S. 369, 87 S. Ct. 1627, 18 L.Ed.2d 830 (1967). In *Reitman*, the Court struck down as unconstitutional, a state statute which authorized "racial discrimination in the housing market." 387 U.S. at 381, 87 S. Ct. at 1637. As such, *Reitman* is the legislative-participation equivalent of *Shelley*'s holding with regard to the judiciary's *purposeful* participation in depriving individuals of their substantive constitutional right to enjoyment of property.

These principles were carried forward in *Lugar*, which also focused upon purposeful discrimination by the government. Specifically, the government had "created a system whereby state officials [would] attach property on the *ex parte* application of one party to a private dispute." 457 U.S. at 942, 102 S. Ct. at 2756. The holding in *Lugar* was based upon the *joint action* of a state officer

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[6] *Swain*, 380 U.S. at 203, 85 S. Ct. at 826; *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 701, 42 L.Ed.2d 690 (1975); *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 1070 n.1, 103 L.Ed.2d 334 (1989); *Holland v. Illinois*, ___ U.S. ___, 110 S. Ct. 803, 806, 107 L.Ed.2d 905 (1990).

and a creditor in securing property with the result that the decision to discriminate could be ascribed to the government.[7]

The interpretation of *Shelley* and its progeny as urged by the petitioner would confer insupportable expansiveness to these decisions and would, in practice, place constitutional restraints on any and all private choices. *Shelley* does not mandate a result different from that reached by the court below. At most, the cases discussed above show only that governmental action *may* consist of judiciary involvement under some circumstances.

Likewise, *Burton* does not warrant a different result. *Burton* involved the refusal of the operator of a restaurant to serve a patron based upon the patron's race. The Court found state action to be present in that the restaurant was on property leased to the private party by an agency of the state. While *Burton* may appear to extend the scope of governmental responsibility, the opinion is self-limiting:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are *by no means declared as universal truths* on the basis of which every state leasing agreement is to be

[7] *See also Tulsa Professional Collection Services, Inc. v. Polk*, 485 U.S. 478, 108 S. Ct. 1340, 99 L.Ed.2d 565 (1988) which is the procedural due process equivalent of *Shelley*'s equal protection holding. Specifically, the case addressed the requirement of notification of state action affecting property rights of the individual. The Court determined that "state action" was present, because the probate court was "intimately involved throughout" the process of a probate statute which could not be executed without this involvement.

tested. Owing to the very "largeness" of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, *can be determined only in the framework of the peculiar facts or circumstances present*. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "differences in circumstances [which] beget appropriate differences in law." [citation omitted] *Specifically defining the limits of our inquiry*, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lease as certainly as though they were binding covenants written into the agreement itself.

365 U.S. at 725-726, 81 S. Ct. at 862, 6 L.Ed.2d 45 (1961) (emphasis supplied).

Furthermore, it has been suggested in commentary that the precedential value of *Burton* has dwindled.[8] Indeed, the Supreme Court refused to apply the *Burton* rationale in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S. Ct. 1965, 32 L.Ed.2d 627 (1972). *Moose Lodge*, like *Burton*, involved refusal of service by a private party on the basis of race. The appellee was a negro guest of a member of a private club and was refused service at the club's dining

[8] *See* L. Tribe, *American Constitutional Law* (2d ed. 1988) at 1701 n.13, discussing *San Francisco Arts & Athletic, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S. Ct. 2971, 97 L.Ed.2d 427 (1987).

room and bar because of his race. He contended that the discrimination was state action in violation of the Fourteenth Amendment in that the state liquor board had issued a private club liquor license to the club. The Court concluded that the club's actions did not present a violation of the Fourteenth Amendment, distinguishing *Burton* on the grounds that, in *Burton*, "profits earned by discrimination not only contribute[d] to, but also were indispensable elements in the financial success of a governmental agency." 407 U.S. at 174-75, 92 S. Ct. at 1972, quoting *Burton*, 365 U.S. at 723-724, 81 S. Ct. at 861. The Court noted that "[h]ere there is nothing approaching the symbiotic relationship" involved in *Burton*. 407 U.S. at 175, 92 S. Ct. at 1972. The *Moose Lodge* opinion adopts *Reitman*'s instruction that "where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discriminations.' " 407 U.S. at 173, 92 S. Ct. at 1971, quoting *Reitman*, 387 U.S. at 380, 87 S. Ct. at 1634. The Court concluded:

> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.

407 U.S. at 176-177, 92 S. Ct. at 1973.

Applying the rationale of *Moose Lodge* to the instant case, it would be appropriate to refer to Judge Gee's dissenting comments, in the panel opinion, concerning the role of the trial judge in connection with the exercise of peremptory challenges by a private attorney representing a private client.

> It is difficult to conceive of more minimal involvement than this – one which requires the exercise of no judgment or discretion, one which consists of nothing more than permitting the excused to depart.

See Edmonson, 860 F.2d at 1316. Under the circumstances of this case, there is undeniably no "symbiotic relationship" between the trial judge and private counsel, nor is there any rational basis for attributing to the trial judge significant involvement in, or encouragement of, private counsel's decision concerning who will be the subject of his peremptory challenges. In sum, *Burton* does not provide authority for petitioner's position.

Petitioner also suggests that the attorney exercising the peremptory challenges, under the supervision of the trial judge, is a "state actor." However, such a suggestion flies in the face of this Court's holding that a public defender is not a state actor in performing a lawyer's traditional function as counsel to a defendant in a state criminal proceeding. *Polk County v. Dodson*, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed.2d 509 (1981). To recognize that a public defender employed by the government is not a governmental actor while performing the traditional functions of a lawyer, and yet to attribute governmental action to a privately-retained counsel performing those functions, is to create an irreconcilable inconsistency. Moreover, to attribute state action to decisions made by the attorney concerning peremptory challenges based solely upon the judge's presence in the courtroom to supervise the proceedings, is to create, not merely a legal fiction, but an untenable fantasy. If this were the result, it is apparent that any and all actions of an attorney during

judicial proceedings could be the subject of a constitutional attack or a suit for damages under 42 U.S.C. § 1983. The result would be to totally undermine the roll of the attorney in any judicial proceeding. More importantly, this would be to apply constitutional principles far beyond their defined scope.

III. THE RATIONALE FOR THE *BATSON* HOLDING IS ABSENT IN CIVIL LITIGATION BETWEEN PRIVATE PARTIES.

Petitioner argues that the holding of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) should be extended to encompass civil litigation between private parties. However, the underlying rationale of the *Batson* decision is absent in such cases.

The *Batson* holding was built from the foundation of cases in which the Court has repeatedly held that discrimination in the procedures used to select a jury venire is unconstitutional. *See Batson*, 476 U.S. at 84 n.3, 106 S. Ct. at 1716 n.3. For over one hundred years, the Court has guarded the principle that it is unconstitutional for the state to deliberately, intentionally, and systematically exclude any class of persons from the jury venire.[9] The systematic exclusion of any group from the jury venire violates the litigant's entitlement to a venire designed to

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[9] *See, e.g., Avery v. State of Georgia*, 345 U.S. 559, 73 S. Ct. 891, 91 L.Ed. 1244 (1953) (exclusion based upon race); *Ballard v. United States*, 329 U.S. 187, 67 S. Ct. 261, 91 L.Ed. 181 (1946) (exclusion based upon sex); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 66 S. Ct. 984, 90 L.Ed. 1181 (1946) (exclusion of daily wage earners).

represent a fair cross section of the community. *Holland v. Illinois*, ___ U.S. ___, 110 S. Ct. 803, 805 (1990). The *Batson* decision rested upon the settled principle that "the state may not draw its jury list pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.' " *Batson*, 476 U.S. at 88, 106 S. Ct. at 1718, quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S. Ct. 891, 893, 97 L.Ed. 1244 (1953). The Court made it clear that the deliberate and systematic exclusion of any group of citizens from serving as jurors constituted "a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85, 106 S. Ct. at 1716. The identified "evil" is "the false assumption that members of [a particular] race as a group are not qualified to serve as jurors." *Batson*, 476 U.S. at 86, 106 S. Ct. at 1717. Furthermore, in criminal prosecutions, it is unconstitutional for the state to exercise peremptory challenges "to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723. Thus, the Court delineated a procedure designed to effectuate these principles. DRI acknowledges the policies which prompted the Court to place these constraints upon the criminal prosecutor. *His role is to enforce the purpose of the state and to assure that justice is done.* As the *Edmonson* majority observed:

> It is, we think, a sound policy that requires the state to conform to stricter standards and appearances in dealing with its citizens than are demanded of those citizens in their dealings with each other.

Edmonson, 895 F.2d at 225.

The role of the private attorney representing a private citizen in a civil lawsuit is distinct from that of the criminal prosecutor. He is bound by oath to represent his client zealously within the bounds of the law. In his role as advocate, his purpose is to achieve a resolution most favorable to his client. In the jury selection process, he ideally hopes to select individuals with a predisposition to viewing the evidence in a light most favorable to his client. He exercises his peremptory challenges with an interest in excluding any member of the venire who, to his mind, may have a predisposition to viewing the evidence in a light more favorable to the opposing party than to his client. Presumably, petitioner's attorney did exactly this when he utilized his peremptory challenges to strike three white members of the jury venire. However, petitioner's entire thesis is premised upon an untenable assumption: that exercising peremptory challenges in a civil lawsuit allows "those to discriminate who are of a mind to discriminate." *Avery*, 345 U.S. at 562, 73 S. Ct. at 892. It is inconceivable that an attorney in a civil action, even if he has a mind to discriminate, would exercise his peremptory challenges in any manner other than to achieve a panel of persons whom he believes will view the evidence in the light most favorable to his client.

Moreover, the "evil" which *Batson* was designed to eliminate, namely, the *intentional and systematic exclusion* of any particular group from having the opportunity to be selected for jury service, is simply not present in civil cases. While a government prosecutor may have the power to effectuate such an evil, it is inconceivable that any private attorney representing private parties has the

means to wield such power as to accomplish the systematic exclusion of any group from jury service.

In urging this Court to apply the *Batson* holding to civil cases, petitioner has cast a wide net over the various cases in which this Court has affirmed and reaffirmed its commitment to eradicate discrimination violative of constitutional rights. Obviously, in order for the Court to accept petitioner's position, it would be necessary to find that some right of the petitioner protected by law has been violated. Petitioner has invoked the Fourteenth Amendment. However, in the final analysis, petitioner contends that the right in question is the "fair possibility for obtaining a representative cross section of the community" on the jury panel.[10] The "fair cross section" requirement, however, applies only to the jury venire. *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970). As the Court has instructed:

> The fair-cross-section venire requirement assures . . . that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis.
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> But to say that the Sixth Amendment deprives the State of the ability to "stack the deck" in its

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[10] Petitioner has also invoked 42 U.S.C. § 1981, relying on the cases of *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L.Ed.2d 415 (1976) and *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S. Ct. 2363, 105 L.Ed.2d 132 (1989). Both of these cases address deprivation of the right to enter contracts and neither has any particular bearing upon the issues before this Court. The issue of whether the jury selection process has been conducted in a manner which violates federal law has consistently been decided by this Court under the Sixth and Fourteenth Amendments.

> favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side.

Holland v. Illinois, ___ U.S. ___, 110 S. Ct. 803, 807, 107 L.Ed.2d 905 (1990). Thus, returning to the initial inquiry, what is the protected right which, according to the petitioner, has been violated? Clearly, a party is not entitled substantively to a jury containing members of his own race, *Swain*, 380 U.S. at 203, 85 S. Ct. at 826, nor is a party entitled to a jury which "mirror[s] the community as reflect[s] the various distinctive groups in the population," *Holland*, 110 S. Ct. at 808-809.

Petitioner's arguments then, must stand or fall under the Fourteenth Amendment and the holding of *Batson*. Hence, petitioner's arguments fail. The Court in *Batson* made it clear that "the component of the jury selection process at issue" was "the *State's* privilege to strike individual jurors through peremptory challenges," a privilege subject to the Fourteenth Amendment which precludes the intentional and systematic exclusion of a cognizable group. *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719 (emphasis supplied). On a more elementary level, it simply cannot be said that petitioner's right to equal protection under the law has been violated, since each party had equal prerogative and opportunity to peremptorily strike whomever they chose from the jury venire. As this Court has stated (albeit in connection a Sixth Amendment issue):

> [The fair-cross-section venire requirement] has never included the notion that, in the process of drawing the jury, that initial representativeness cannot be diminished by allowing

> both the accused and the State to eliminate persons thought to be inclined against their interest – which is precisely how the traditional peremptory-challenge system operates.

Holland, 110 S. Ct. at 807. In *Holland*, the Court rejected the notion that the fair-cross-section requirement was violated by use of peremptory challenges to strike perspective jurors of a particular race, and petitioner has failed to show how he has been denied the equal protection of the law. Specifically, the petitioner has identified the right of which he has allegedly been deprived as his "fair possibility for obtaining a representative cross-section of the community." Neither the facts, nor the law, support the proposition that petitioner's Fourteenth Amendment rights have been violated. He has had his day in court. Indeed, there is no suggestion that the jury in this case was not impartial or that he did not have a fair trial. In the final analysis, petitioner has simply "roll[ed] out the ultimate weapon, the accusation of insensitivity to racial discrimination – which will lose its intimidating effect if it continues to be fired so randomly." *Holland*, 110 S. Ct. at 810.

At this juncture, it is appropriate to ask: How does the exercise of peremptory challenges in a civil case give rise to the possibility of "discrimination"? By way of example, an attorney representing a woman claiming damages resulting from sexual harassment in the work place might utilize all peremptory challenges to strike male veniremen, particularly if they are employed in managerial capacities. Plaintiff in such a case might well believe that the stricken veniremen have as much chance of understanding her plight as they would empathizing

with childbirth. On the other hand, the defendant in such a case might utilize all peremptory challenges to strike women from the panel on the belief that, since most (if not all) women have at some time or another experienced some form of sexual discrimination, women would be more likely to view the plaintiff's case in a favorable light. Undeniably, the Fourteenth Amendment protects persons from denial of equal protection on the basis of sex. But, in the example given above, can it be said that either plaintiff's or defendant's constitutional rights have been violated or that either party has engaged in "discrimination"? DRI submits that the answer to this question is "no." Rather, each party has had an opportunity to participate in the jury selection process in a manner which assures each of them the greatest chance of having their case heard by a fair and impartial jury.

Likewise, in the example set forth by the *Edmonson* majority:

> . . . [O]ne may well imagine that counsel defending a well-known member of the Ku Klux Klan in an action for, say, breach of contract by a white plaintiff might strike any black veniremen whom he had been able to convince the judge to excuse for cause, *not because of any notion of ethnic inferiority*, but rather on the prudential ground of probable hostility ineradicable despite the subject's best efforts. Such an action does not demean the stricken subject; it merely recognizes a probable fact of life.

895 F.2d at 224 (emphasis supplied).

Neither example implies violation of a constitutional right. Rather, in each example, both sides have been allowed "to eliminate persons thought to be inclined

against their interests – which is precisely how the traditional peremptory-challenge system operates." *Holland*, 110 S. Ct. at 807. More importantly, in each instance, the private parties neither intend, nor have the power, to execute a systematic exclusion of a class of individuals from jury service on the basis of race or sex.

Finally, it is necessary to posit the full ramifications of the proposition that the privilege of private parties to use peremptory challenges is subject to the equal protection clause of the Fourteenth Amendment. Put simply, if this Court were to accept petitioner's position, then virtually any party who belongs to a "cognizable class," and who is dissatisfied with the considered judgment of a jury, will have a ready basis for seeking a new trial. In that event, the courts will, no doubt, be required to sift through such questions as: Does the rule apply where the representative of a corporate defendant is white and plaintiff utilizes his peremptory challenges to strike white veniremen? Under what circumstances would the rule apply to peremptory challenges used to strike persons of a certain sex? Or sexual preference? Or ethnic group? Or religious affiliation? It is submitted that in civil cases, where neither life nor liberty are at stake, and where the state is not a party, the exercise of peremptory challenges need not be hampered by consideration of these questions.

CONCLUSION

In conclusion, DRI respectfully submits that this Honorable Court should affirm the *en banc* decision of the court below. The use of the peremptory challenge in civil litigation is a privilege bestowed by statute. The exercise of peremptory challenges in civil litigation between private parties does not imply any government action which would promote such conduct to constitutional dimensions. Moreover, the result urged by the petitioner has no basis in this Court's decisions, which were meant to address and correct the purposeful and systematic exclusion of persons from jury service on account of race or other classifications. DRI and its members view the peremptory challenge as a valuable and useful tool in assuring fairness in the jury selection process, and it is a privilege which should remain intact without unwarranted and unjustified dilution.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1990

THADDEUS DONALD EDMONSON,

Petitioner,

v.

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF DIXIE INSURANCE COMPANY IN SUPPORT OF RESPONDENT, LEESVILLE CONCRETE COMPANY, INC.

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INTEREST OF DIXIE INSURANCE COMPANY, AMICUS CURIAE IN SUPPORT OF RESPONDENT, LEESVILLE CONCRETE COMPANY, INC.

Plaintiffs in an action against Dixie Insurance have petitioned for *certiorari* (No. 90-240) as a result of the Fifth Circuit's ruling in *Polk v. Dixie Ins. Co.*, 897 F.2d 1346 (5th Cir. 1990). The Fifth Circuit based its ruling on its earlier en banc opinion in *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990).

Because the decision by this Court in the *Edmonson* case will directly affect its interests, Dixie Insurance would like to state its position regarding this important and far-reaching issue.

Consent to file an amicus brief has been obtained from both Petitioner and Respondent in this matter as evidenced by letters of counsel filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. In the situation of private counsel of civil litigants exercising their right to peremptory strikes, the requisite state action for constitutional challenge does not exist. Further, the purely ministerial function of the court in excusing the potential juror is insufficient involvement by the state to render the process one of state action. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient . . . . " *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Therefore, the test enunciated in *Batson v. Kentucky*, 476 U.S. 79 (1986), in the context of

equal protection, should not be extended to control the actions of private parties.

2. The innate differences between a criminal and civil proceeding make it unnecessary to extend the rule set forth in *Batson v. Kentucky* for criminal defendants to civil litigants. The criminal justice system has long required higher levels of protection and more safeguards for criminal defendants than that afforded to civil litigants. Thus, in balancing the recognized importance of peremptory strikes with the interests of civil litigants, as opposed to criminal defendants, the safeguards deemed necessary in *Batson* should not be required in civil trials.

3. The actions complained of by Petitioner in this case are not the type requiring the application of the Court's supervisory powers. In fact, exercise of the Court's supervisory powers would adulterate the long recognized importance of the civil litigant's unfettered use of peremptory strikes in an effort to obtain an unbiased jury in his cause of action.

ARGUMENT

Once again this Court is called upon to make a decision regarding peremptory strikes and their alleged use as a discriminatory tool. Quite simply, the question before the Court is whether or not the procedure enunciated in *Batson v. Kentucky*, 476 U.S. 79 (1986), should now be made applicable in civil proceedings as well. Because there is no state action involved when a private party makes use of his peremptory strikes and because of the

inherent differences between criminal and civil proceedings, the *Batson* rule should be limited to criminal trials.

I. When a private party makes use of his peremptory strikes in a civil action, the requisite state action for constitutional challenge does not exist.

It hardly needs reiterating that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).[1] Furthermore, "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some *significant* extent the State in any of its manifestations has been found to have become involved in it." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (emphasis added).

Obviously, the act of an attorney in exercising peremptory strikes for a private party in a civil suit is private conduct and outside the reach of equal protection challenges. Indeed, in *Polk County v. Dodson*, 454 U.S. 312 (1981), this Court held that a public defender, paid by the

[1] Because the action complained of in the present suit occurred in federal court, it is actually the Fifth Amendment's due process guarantee at issue rather than the Fourteenth Amendment's equal protection clause. Of course, the Fifth Amendment's due process clause has been held to guarantee the same rights as the Fourteenth Amendment's equal protection clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Consequently, cases interpreting state action under the Fourteenth Amendment are applicable in the discussion of this case as well.

state, is not a state actor "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County*, 454 U.S. at 325. Consequently, Edmonson does not claim that the lawyer's actions alone are enough; rather, it is his contention that the trial judge, by not interfering with Respondent's use of its peremptory strikes, supplies the requisite state action. In essence, Edmonson argues that the Court's *inaction* constitutes state action in this case. However, such a claim clearly fails to establish that the state is involved to a "significant extent." *Burton*, 365 U.S. at 722.

Similar reasoning was disallowed in the case of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The Court stated as follows:

> Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action." . . . Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

Jackson, 419 U.S. at 357 (footnote omitted). Furthermore, "[t]his Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978).[2]

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[2] *See also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient . . . . ")

It is the attorney, a private citizen, who makes the decision regarding which potential jurors to exclude by means of peremptory strikes in a civil action; the judge merely acquiesces in this decision and excuses the jurors so named. The judge in no way fosters or encourages the use of peremptory strikes in a racially discriminatory manner.[3] The same statement can be made regarding the attorney's decision as was made of the creditor's in *Flagg Bros.*, 436 U.S. at 165: "[T]he State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel . . . . "

Because the State cannot in any manner be deemed to have participated to a significant extent in a private party's exercise of peremptory strikes, the procedure set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), which was based on equal protection principles, should not be made applicable to private parties in civil litigation.

II. The innate differences between a criminal and civil proceeding make it unnecessary to apply the *Batson* rule to civil litigants.

Even without the problem of the lack of state action, the *Batson* rule should still not be applied to civil litigants since the interests of civil litigants need not be protected

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[3] *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) ("However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.")

to the same level as that of criminal defendants. Due to the high stakes involved in criminal trials (many times even the very life of the defendant is at stake), the judicial system has long provided greater procedural safeguards to criminal defendants than those afforded to civil litigants. Just one example is the higher burden of proof required in criminal trials as opposed to civil actions.

Although restricting to some degree the prosecutor's use of peremptory challenges may thus be justified, the same cannot be said for civil litigants. While the interests of the criminal defendant possibly outweigh the interests of the prosecutor in having unfettered use of his peremptory strikes, the interests of civil litigants do not reach this level. Thus, the unfettered use of peremptory strikes should be maintained in civil proceedings.

The importance of peremptory strikes has long been recognized.[4] As stated in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." One author described its function as follows: "The peremptory challenge is the right to exclude from the panel those who are suspected of entertaining a prejudice against a party where sufficient reasons cannot be given for their exclusion for cause." Note, Ross v. Oklahoma: *A Strike Against Peremptory Challenges*, 1990 Wis. L. Rev. 219, 222. In fact, this

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[4] The importance of peremptory strikes was recognized by this Court as early as 1892 in the case of *Lewis v. United States*, 146 U.S. 370 (1892). *See also Pointer v. United States*, 151 U.S. 396 (1894).

author went so far as to assert that "peremptory challenges should receive constitutional protection." *Id.* at 232. Although the Court has not agreed with this rationale, *see Stilson v. United States*, 250 U.S. 583, 586 (1919), only last Term the Court did state that "[o]ne could plausibly argue . . . that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges . . . . " *Holland v. Illinois*, 110 S.Ct. 803, 808 (1990). Thus, the significance of peremptory challenges was acknowledged once again.

In balancing the importance of peremptory strikes with the interests of civil litigants which are affected by their use, the result does not compel the restriction of peremptory challenges as required for criminal defendants in *Batson*. In fact, the nature of civil proceedings probably makes the unrestricted use of peremptory strikes even more important than in criminal prosecutions. As noted by the Fifth Circuit in this case:

> [T]he prosecutor's aim is justice. He wins when justice is done and – although it is surely not the outcome he envisions – when it becomes apparent during the trial of a criminal case, a la the celebrated fictional character of Perry Mason, that the accused is innocent of the crime with which he stands charged, the prosecutor has not "lost."
>
> It is otherwise with the civil advocate. His client is in a quarrel, and he is in a fight. The fight may be a more or less genteel one, conducted in an ethical fashion to be sure; but it remains a fight nonetheless: one which, unless settled, will be won by one side of the contest and lost by the other. It is the first imperative of the civil advocate to see that it is his side that wins.

Edmonson v. Leesville Concrete Co., 895 F.2d 218, 225-26 (5th Cir. 1990). With this goal in mind, the attorney for a civil litigant should have the right to strike anyone from the panel whom, for whatever inexplicable reason, he feels may not favor his client. Of course, the party's opponent has the same opportunity. Thus, between the two litigants' use of their limited number of strikes, an equitable balance is achieved.

Considering the interests affected by the use of peremptory challenges against a party in a civil action, as opposed to the high stakes involved in criminal trials, and the recognized importance of such peremptory strikes in civil litigation, the restrictions applied to peremptory strikes in *Batson* are not justified in the civil arena.

III. The actions complained of by Petitioner in this case are not the type requiring application of the Court's supervisory powers.

Obviously feeling that his constitutional arguments are not strong enough, Edmonson "throws himself on the mercy of the Court" and requests that the Circuit Court's opinion be reversed by use of this Court's supervisory powers over federal courts. A look at the cases Edmonson relies on will show that the actions complained of in this case are not of the same character as those corrected by the Court's supervisory powers in the past.

In *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), the Court exercised its supervisory powers to reverse a judgment in a case where the clerk of the court and the jury commissioner "deliberately and intentionally excluded

from the jury lists all persons who worked for a daily wage." *Thiel*, 328 U.S. at 221. Thus, the State itself was systematically excluding an entire economic class from jury service. The Court found that "[t]he undisputed evidence in this case demonstrate[d] a *failure to abide by the proper rules* and principles of jury selection." *Thiel*, 328 U.S. at 221 (emphasis added). Such is not the case in the underlying action. Proper rules were followed at all times – Leesville Concrete was allowed to peremptorily strike three potential jurors, it did so, and the jurors were excused. This is not a case where the Court's supervisory powers are needed to correct a wrong, for no wrong has been committed. This is equally true in relation to the case of *Ballard v. United States*, 329 U.S. 187 (1946).

Were the Court to step in and utilize its supervisory powers, it would severely limit the civil litigant's unfettered use of peremptory strikes in an effort to obtain a jury unbiased toward his cause. Considering the lack of state action, the importance of peremptory strikes, and the lesser stakes involved in a civil trial as opposed to a criminal prosecution, such action would be unjustified.

CONCLUSION

In light of the foregoing discussion, the *Batson* rule should not be extended to the exercise of peremptory challenges by private parties in a civil action. Therefore, the decision of the en banc Fifth Circuit, *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990), should

be affirmed, and *certiorari* should be denied in *Polk v. Dixie Ins. Co.*, No. 90-240.

Respectfully submitted,

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